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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WHASAM PARK et al., Plaintiffs and Appellants, v. ARKEMA, INC., et al., Defendants and Respondents.	B229513 (Los Angeles County Super. Ct. No. BC350703)

APPEAL from a judgment of the Superior Court of Los Angeles County. William F. Highberger, Judge. Reversed.

Metzger Law Group, Raphael Metzger, Greg Coolidge, and Kathryn (Darnell) Saldana for Plaintiffs and Appellants.

Mendes & Mount, Warren M. Williams; Taubman, Simpson, Young & Sulentor and Joseph Decker for Defendants and Respondents.

Plaintiffs and appellants Whasam Park (Park) and Anne Park (collectively, plaintiffs) appeal from the summary judgment entered in favor of defendants and respondents Arkema, Inc. (Arkema) and Turkish Products, Inc. (collectively, the Arkema defendants) in this personal injury action premised on alleged occupational exposures to various toxic chemicals. Plaintiffs' principal contention is that the trial court exceeded its authority by excluding an expert witness declaration they submitted in opposition to the Arkema defendants' summary judgment motion. We conclude that the trial court's exclusion of plaintiffs' expert declaration under the circumstances presented here constituted an abuse of discretion, even if such exclusion may have been statutorily authorized under Code of Civil Procedure section 2034.300.[1] We therefore reverse the judgment.

BACKGROUND

1. The parties and the instant lawsuit

Arkema is a manufacturer of chemical products, including the products known as "Turco 4460" and "Turco 4385." Turkish Products, Inc. is an indirect wholly-owned subsidiary of Arkema.

Park is a former machinist who suffers from leukemia. As a machinist, he worked with and around chemical products, including products containing benzene, at various locations from 1979 through 2004. Park alleged that his exposure to benzene-containing chemical products was a substantial factor in causing his leukemia. Plaintiffs filed this action on April 13, 2006 against the manufacturers and suppliers of various chemical products to which Park was allegedly exposed.

2. The 2008 motion for summary judgment

On June 30, 2008, all of the then named defendants in the action jointly moved for summary judgment, contending there was no evidence that benzene exposure can cause the specific type of leukemia that Park suffers from. Plaintiffs opposed the motion, and submitted a declaration from Dr. Nachman Brautbar (Brautbar) in support of their

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

opposition. In his August 25, 2008 declaration, Brautbar opined that exposure to benzene can cause the type of leukemia from which Park suffers.

Two days before the trial court ruled on the summary judgment motion, one of the defendants served a demand to exchange expert witness information. In response, plaintiffs served all of the named defendants with their list of designated experts on November 17, 2008. The Arkema defendants were not named in the original complaint, and they accordingly did not participate in the parties' November 2008 exchange of expert witness information. Plaintiffs' November 2008 expert witness designation identified five experts, including Brautbar, who was designated to testify as to the "epidemiology of benzene-induced leukemia."

On November 7, 2008, the trial court denied the motion for summary judgment, finding that triable issues existed as to whether benzene was capable of causing Park's leukemia. At the same time, the trial court overruled the defendants' evidentiary objections to the Brautbar declaration, including all objections challenging the foundation of his opinions.

3. Amended complaint adding the Arkema defendants

In December 2008, plaintiffs filed an amended complaint substituting the Arkema defendants in place of Doe defendants to the action. The Arkema defendants' purported liability was premised solely on Park's exposure to "Turco products," including Turco 4460 and Turco 4385 while he was employed at Northrop Grumman Systems Corporation (Northrop) from October 1985 to February 1994.

In November 2009, the trial court denied the Arkema defendants' motion to dismiss the complaint and continued the trial to October 12, 2010. The trial court also continued all statutory discovery deadlines. The court did not vacate any of the expert designations exchanged by the parties who had appeared in the action.

4. Motion to compel expert depositions

On May 14, 2010, the Arkema defendants served deposition notices on each of plaintiffs' designated experts, including Brautbar, seeking depositions in June 2010. At the time the deposition notices were served, no other defendant had deposed any of

plaintiffs' experts. Plaintiffs served objections to the deposition notices, objecting primarily on the ground that the Arkema defendants had not yet designated their experts, and that allowing the Arkema defendants to proceed with those depositions would result in an improper and unfair unilateral disclosure of expert opinion in violation of section 2034. Plaintiffs further pointed out that the date for expert designations was fifty days before trial, which was set to occur on August 23, 2010, based on the new trial date.

During the meet and confer process preceding the Arkema defendants' motion to compel, the Arkema defendants stated that they would "seek to compel the depositions of Plaintiffs' retained experts . . . and/or seek to have the experts' testimonies excluded from trial" if plaintiffs did not produce their designated experts for deposition.

On June 25, 2010, three days before filing a motion to compel deposition of plaintiffs' experts, the Arkema defendants filed a motion for summary judgment. The motion was premised on, among other grounds, plaintiffs' purported lack of evidence that the type of leukemia from which Park suffers can be caused by exposure to benzene.

After the Arkema defendants filed their summary judgment motion, the parties did not meet and confer further about possibly limiting the scope of Brautbar's deposition to the opinions he had expressed in the August 2008 declaration submitted in opposition to the previous summary judgment motion brought by the other defendants.

On June 28, 2010, the Arkema defendants filed a motion to compel the depositions of plaintiffs' designated expert witnesses, including Brautbar, pursuant to section 2034.410. Plaintiffs opposed the motion, arguing that the trial court's November 2009 order setting a new trial date and extending all discovery deadlines "vacated" the November 2008 expert designations. Plaintiffs further argued that permitting the Arkema defendants to depose plaintiffs' experts would violate section 2034.260 and attorney work product privileges. Plaintiffs maintained that expert designations should occur simultaneously and they should not be required to unilaterally produce their designated experts for deposition before the Arkema defendants disclosed the identity of their experts.

Before the hearing on the Arkema defendants' motion to compel, the trial court issued a tentative ruling rejecting plaintiffs' argument that "the mere setting of a new discovery cut-off to correlate to the new trial date negates the validity of the prior expert designations." The court noted that "[i]f this works an asymmetrical advantage to late-added parties, it is only a partial offset for the due process burden placed upon the same parties by not being allowed to participate in the case throughout the discovery and law-and-motion practice phases." On the day before the hearing on the motion to compel, plaintiffs filed and served a notice of withdrawal of their designation of all of the experts identified in their November 2008 designation, including Brautbar.

At the August 5, 2010 hearing on the motion to compel, plaintiffs' counsel stated that plaintiffs had withdrawn their prior expert designations and would be serving a new expert designation on August 23. The trial court admonished plaintiffs' counsel that "If they are any of these [de-designated] experts, they will be precluded from testifying at trial because of this gamesmanship. . . . I'm not going to let you redesignate them in order to get around this tentative." "If you redesignate them, you will not be able to use those experts or anybody from the same shop to testify at trial. That's gamesmanship I will not accept." The trial court then granted the Arkema defendants' motion to compel, stating: "The only reason I'm finalizing the order is to tee it up so that if you try to redesignate them, the impropriety of that will be evident on the record."

Ten days after the August 5, 2010 hearing, plaintiffs withdrew their de-designation as to two of their previously designated experts. They did not withdraw their de-designation of Brautbar, but designated a different physician, Dr. Robert Harrison (Harrison), as their new expert on general causation.

5. The Arkema defendants' motion for summary judgment

The Arkema defendants sought summary judgment on two principal grounds: (1) plaintiffs lacked evidence that Park was exposed to any product for which defendants could be held liable, and (2) plaintiffs lacked evidence that the type of leukemia from which Park suffers can be caused by exposure to benzene.

The Arkema defendants conceded that Northrop purchased two products manufactured by Arkema, Turco 4385 and Turco 4460, for use in Northrop's aircraft division. They argued, however, that Park's own testimony established that he never used Turco 4385, and there was no evidence that either Turco 4385 or Turco 4460 was used in the particular building in which Park worked during his employment at Northrop.

In support of their motion, the Arkema defendants submitted the declaration of Dr. David Garabrant, an expert on epidemiology. In his declaration, Garabrant stated that "there is no reliable epidemiological evidence to support an opinion that exposure to either benzene, machining fluids, or solvents is causally associated with the development of" the disease Park suffers from. The Arkema defendants accordingly argued that plaintiffs could not establish that benzene is capable of causing Park's illness.

Plaintiffs filed their opposition to the summary judgment motion on August 27, 2010, after they had withdrawn their designation of Brautbar and designated Harrison in his stead. In support of their opposition, plaintiffs submitted the same August 2008 declaration by Brautbar they had used to successfully oppose the summary judgment sought by the other defendants in 2008. In that declaration, Brautbar opined that exposure to benzene can cause the type of leukemia from which Park suffers. Brautbar further stated that the scientific and medical literature supports a causal relationship between benzene exposure and Park's type of leukemia. Plaintiffs' opposition was also supported by Park's deposition testimony, in which he stated that he knew the solvent he used while employed at Northrop was called "Turco" because he was so informed by a co-worker; by the deposition testimony of a Northrop coworker named Mario Moran, who said that during his employment, he used a solvent in a can labeled "Turco" followed by a four-digit number he could not remember; and by a list of chemical products provided by Northrop purportedly identifying Turco products used by Northrop's aircraft division.

The Arkema defendants objected to the foregoing evidence as inadmissible hearsay and as lacking adequate foundation. They objected to the Brautbar declaration as improper expert testimony from a withdrawn expert who was not made available for

deposition. They urged the trial court to exclude the declaration pursuant to section 2034.300.

The trial court sustained nearly all of the Arkema defendants' evidentiary objections, including the objection to Brautbar's declaration. The trial court based its evidentiary ruling with regard to the Brautbar declaration on section 2034.300, which authorizes the exclusion from evidence of an expert opinion offered by a party who has unreasonably failed to make that expert available for deposition. The trial court noted that plaintiffs had resisted defendants' efforts to depose Brautbar, and that the statute did not limit the exclusion of evidence to expert opinions offered at trial, but applied to all expert opinions offered by a party. The trial court also based its exclusion of Brautbar's opinion on "due process concerns" and the court's "inherent authority to control proceedings before it." The court reasoned that "[d]ue process requires that parties have the opportunity to cross-examine their opponents' witnesses."

The trial court concluded that plaintiffs had established a triable issue as to whether they had or could reasonably obtain evidence that Park was exposed to Turco 4460 and denied the Arkema defendants' motion for summary judgment on that basis. The trial court granted the Arkema defendants' motion, however, on the alternative ground that plaintiffs failed to establish any triable issue of fact as to whether exposure to benzene could cause Park's illness. The trial court reasoned that plaintiffs' opposition as to this issue was based entirely on Brautbar's declaration, which the court excluded under section 2034.300.

Judgment was subsequently entered in the Arkema defendants' favor, and this appeal followed.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend the trial court erred as a matter of law by granting the motion to compel deposition of their experts before defendants were required to designate their expert witnesses. Plaintiffs further contend the trial court exceeded its authority by sustaining the Arkema defendants' objection to the Brautbar declaration submitted in opposition to the motion for summary judgment.

DISCUSSION

I. Applicable legal principles

A. General principles and standard of review

A trial court's ruling on a motion to compel discovery is reviewed for abuse of discretion (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733), as is a ruling on an evidentiary objection in a motion for summary judgment. (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1407.) Discretion is always delimited, however, by the applicable governing statutes. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1107.) "'[W]hen the exclusion of expert testimony rests on a matter of statutory interpretation, we apply de novo review.' [Citation.]" (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950 (*Penny Lane*).)

"When construing a statutory scheme, our primary guiding principle is to ascertain the intent of the Legislature to effectuate the purpose of the law. [Citation.]" (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1204.) "We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]" (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

B. The pertinent statutes and the statutory scheme

The requirements for disclosure of expert witness information are set forth in sections 2034.210 through 2034.730. Section 2034.210 provides that after an initial trial date has been set in an action, "any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses." (§ 2034.210.) Upon service of such a demand, "[a]ll parties who have

appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand." (§ 2034.260.) That information must include, among other things, a list setting forth the name and address of any expert witness expected to testify at trial, and a declaration containing "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (§ 2034.260, subds. (b)(1) & (c)(2).) Section 2034.410 provides that "[o]n receipt of an expert witness list from a party, any other party may take the deposition of any person on the list."

Failure to comply with the statutory disclosure requirements will result in exclusion of the expert opinion testimony. (§ 2034.300.) Section 2034.300 provides in relevant part: "[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, 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: [¶] . . . [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)."

"The statutes governing expert witness discovery are part of the Civil Discovery Act (§ 2016.010 et seq.). The purposes of the discovery statutes are 'to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise.' [Citation.]" (*Penny Lane, supra*, 170 Cal.App.4th at p. 950.) The purpose of the expert discovery statutes 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." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.)

II. Motion to compel deposition

Plaintiffs contend the trial court's order granting the Arkema defendants' motion to compel the deposition of plaintiffs' experts was based on an erroneous interpretation of

section 2034.410 and contravened section 2034.210, applicable case authority, and the attorney work product doctrine.

A. Section 2034.410

Section 2034.410 provides in relevant part as follows: "On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list." Plaintiffs contend defendants were not entitled to depose plaintiffs' experts because defendants were not in "receipt" of plaintiffs' initial expert designation within the meaning of the statute because they were not parties to the action at the time of the November 2008 expert witness exchange. Plaintiffs maintain that the right to depose a designated expert witness under section 2034.410 applies only to a party to the action who was served with an expert witness list at the time of the simultaneous expert witness exchange specified in sections 2034.210 and 2034.260.

The plain language of section 2034.410 does not support plaintiffs' interpretation. The statute allows "any other party" to the action to depose a party's designated expert witness. It is not limited to parties who have appeared by the time of the expert witness exchange specified in section 2034.260. When construing a statutory provision, "'"a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language."' [Citation.]" (*Penny Lane, supra*, 170 Cal.App.4th at p. 952.) The Arkema defendants' inability to participate in the parties' initial November 2008 expert witness exchange did not preclude them from deposing plaintiffs' designated expert witnesses.

B. Section 2034.210

Plaintiffs argue that the trial court's order granting the Arkema defendants' motion to compel the deposition of plaintiffs' experts before the Arkema defendants were required to disclose the identity of their own experts contravened section 2034.210 and applicable case authority. The statute, plaintiffs contend, requires simultaneous exchange of expert witness information as a prerequisite to obtaining expert discovery.

Section 2034.210 provides in relevant part: "After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties

simultaneously exchange information concerning each other's expert trial witnesses." The statute allows any party to "demand a mutual and simultaneous exchange by all parties" of a list of expert witnesses, including "a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert . . . ." (§ 2034.210, subds. (a) & (c).)

Neither section 2034.210 nor the cases cited by plaintiffs address the question presented here -- whether defendants brought into the action on the eve of trial and after the other parties had exchanged expert witness information are precluded from obtaining expert discovery until they have exchanged expert witness information with the other parties to the action. The cases on which plaintiffs rely to support their position are inapposite. *South Tahoe Public Utility Dist. v. Superior Court* (1979) 90 Cal.App.3d 135 involved a trial court's erroneous order requiring a party to provide the names and addresses of its experts before an initial trial date had been set in the case, in violation of the then applicable expert discovery statute, section 2034[2]. In the instant case, an initial trial date had been set and a mutual exchange of expert witness information between plaintiffs and the other parties had already occurred at the time the trial court ordered plaintiffs to make their experts available for deposition.

Hernandez v. Superior Court (2003) 112 Cal.App.4th 285, on which plaintiffs also rely, involved a case management order requiring the plaintiffs to disclose their experts' opinions on causation before any exchange of expert witness information had occurred so that the parties could determine whether motions for summary judgment were warranted. (*Id.* at p. 296.) The Court of Appeal concluded that the order exceeded the trial court's authority because it conflicted with the statutory requirement for simultaneous, mutual exchange of expert witness information. (*Id.* at p. 297.) The court in *Hernandez* reasoned that "[i]n general, fairness demands adherence to the statutory procedures, since they were designed to place the parties '"on roughly equal footing."' [Citation.]" (*Ibid.*)

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[2] Effective July 1, 2005, the Code of Civil Procedure sections governing discovery, including section 2034, were renumbered without substantive change. (Stats. 2004, ch. 182, § 23.)

The Arkema defendants in the instant case were not on equal footing with plaintiffs and the other parties at the time defendants were brought into the action. They were at a disadvantage because they had had no opportunity to participate in the original expert witness exchange or in any previous discovery that had occurred in the case. That imbalance was created not by any fault of the Arkema defendants but by plaintiffs' conduct in belatedly adding defendants to the case on the eve of trial. The trial court's order granting defendants' motion to compel deposition of plaintiffs' experts was intended to equalize an imbalance that existed between defendants and the other parties and did not contravene the statutory discovery scheme.

C. Work product doctrine

Plaintiffs suggest the attorney work product doctrine shielded their experts from deposition and that the trial court erroneously found they had waived the work product privilege at the time of their initial expert designation in November 2008.

The work of an expert-consultant is protected by the attorney work product privilege. (*County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 654.) Once it appears reasonably certain that the expert will testify as a witness on a material matter in dispute, however, the expert's opinions are subject to discovery and disclosure and are no longer protected by the work product privilege. (*Id.* at p. 655.) At that point, the privilege may be preserved only if the expert designation is withdrawn before any disclosure of a significant part of the privileged information has occurred. (*Shooker v. Superior Court* (2003) 111 Cal.App.4th 923, 930 (*Shooker*).)

Plaintiffs designated Brautbar pursuant to section 2034.210 as an expert whose opinion they expected to offer in evidence at trial. They did not withdraw that designation on the eve of the initial trial date, nor did they do so nearly a year later at the November 2009 hearing at which the trial date was continued. At the time the Arkema defendants sought to depose Brautbar and the other experts, any work product privilege that attached to the opinions of those experts could be preserved only by withdrawing those expert designations. The work product privilege did not shield plaintiffs' experts from being deposed. (*Shooker, supra*, 111 Cal.App.4th at p. 930.)

III. Exclusion of expert declaration

Plaintiffs challenge the trial court's exclusion of Brautbar's declaration submitted in opposition to the Arkema defendants' motion for summary judgment on the following grounds: (1) the Arkema defendants lacked standing to object to the Brautbar declaration under section 2034.300, (2) the trial court lacked authority under section 2034.300 to exclude the Brautbar declaration in the summary judgment proceeding, and (3) the trial court's exclusion of the Brautbar declaration exceeded its inherent authority under California law.

A. The Arkema defendants' standing under section 2034.300

Section 2034.300 provides that "on objection of any party who has made a complete and timely compliance with section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [m]ake that expert available for deposition." (§ 2034.300, subd. (d).) Plaintiffs contend the Arkema defendants lacked standing to object to the Brautbar declaration under section 2034.300 because the Arkema defendants did not participate in the November 2008 mutual exchange of expert witness information and therefore failed to timely comply with section 2034.260.

The Arkema defendants were not parties to the action in November 2008 and therefore could not have participated in the expert witness exchange at that time. Plaintiffs concede that the Arkema defendants timely complied with the expert witness exchange requirements applicable to them as newly added parties, in accordance with the trial court's order continuing the trial date and associated discovery deadlines. The Arkema defendants did not lack standing to object to the Brautbar declaration.

B. The trial court's authority under section 2034.300

Section 2034.300 empowers the trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to make that witness available for deposition. (§ 2034.300, subd. (d).) A trial court's determination under section 2034.300 that a party has unreasonably failed to comply with the statutory requirements for expert

witness discovery is reviewed for abuse of discretion. (*Penny Lane, supra*, 170 Cal.App.4th at p. 950.)

Plaintiffs contend section 2034.300 applies only to the exclusion of expert testimony at trial and cannot be used to exclude a declaration submitted in a summary judgment proceeding. They cite the Fifth Appellate District's decision in *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575 (*Modesto*) as support for their argument. The court in *Modesto* concluded that a court's authority under former section 2034[3] to exclude expert testimony from evidence did not apply to a summary judgment proceeding. (*Modesto*, at pp. 581-583.)

We need not determine whether the *Modesto* court's interpretation of section 2034.300 should apply here because even assuming the trial court had the authority to exclude the Brautbar declaration, its exclusion was an abuse of discretion under the circumstances presented here.[4]

At the time plaintiffs de-designated Brautbar as an expert witness, the trial court admonished counsel that the de-designated experts would "be precluded from testifying *at trial*" and that if counsel were to "redesignate them, you will not be allowed to use those experts or anybody from the same shop to testify *at trial*." (Italics added.) The trial court's admonishment did not prohibit plaintiffs from using the declaration of any de-designated expert in a pretrial proceeding such as the pending summary judgment motion.

During oral argument on appeal, plaintiffs' counsel argued that he did not understand the trial court's prohibition to include the pending summary judgment motion and that he assumed plaintiffs could in good faith use Brautbar's declaration for that

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3 As discussed, section 2034 was repealed in 2005 and its provisions reenacted and renumbered without substantive change as sections 2034.210 to 2034.730. (Stats. 2004, ch. 182, § 23.)

4 Because we conclude the trial court abused its discretion under section 2034.300 by excluding the Brautbar declaration, we need not address the parties arguments as to whether such exclusion also exceeded the trial court's "inherent authority" to remedy litigation abuses.

purpose. The misunderstanding would not have occurred if the trial court's admonition had expressly precluded plaintiffs from using their de-designated experts not only at trial, but also in pretrial proceedings such as the pending summary judgment motion. The consequence of that misunderstanding was severe, as it resulted in the termination of plaintiffs' case against the Arkema defendants at the summary judgment phase. Under these circumstances, the trial court's exclusion of the Brautbar declaration was an abuse of discretion.

DISPOSITION

The judgment is reversed. The parties will bear their respective costs on appeal. NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD