Filed 4/11/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIMBERLY DUBONT et al.,	
Plaintiffs and Appellants,	G026598
v.	(Super. Ct. No. 755021)
CORNELL UNIVERSITY et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from an order of the Superior Court of Orange County, Robert E. Thomas, Judge. Reversed and remanded.

Blum & Roseman, Law Offices of Melanie R. Blum, Melanie R. Blum; Robinson, Calcagnie & Robinson, Mark P. Robinson, Jr. and Sharon J. Arkin for Plaintiffs and Appellants.

Musick, Peeler & Garrett, William McD. Miller, III, Cheryl A. Orr and Kevin D. Jeter for Defendants and Respondents.

*   *   *

The defendants filed a motion for summary adjudication. The plaintiff indicated a need for a continuance because potentially crucial discovery was still ongoing. The court declined to grant a continuance and granted the motion for summary

adjudication instead. In so doing, the court abused its discretion. We reverse and remand.

I

FACTS

Kimberly Dubont and her husband sued a number of defendants for various causes of action arising out of the alleged misuse of certain eggs that were taken from her during the course of infertility treatments at the University of California, Irvine (UCI). Cornell University, its medical school, and a related infertility center it operates (the Division of Reproductive Medicine and Infertility) were among the numerous defendants. The Cornell defendants were named in causes of action for conversion, fraud, negligence and civil conspiracy. The Cornell defendants moved for summary adjudication. Part of the Dubonts' opposition was to inform the court that the motion was premature because further discovery needed to be conducted.

To support their argument the motion was premature, the Dubonts submitted a declaration from Attorney Melanie R. Blum which stated that a key witness to unresolved issues, Dr. Anna Viega,[1] was on vacation, and that she did not know the date of the doctor's return. Attached to Attorney Blum's declaration was an unverified statement she said was signed by Dr. Viega before she left for her vacation. That declaration provided potentially crucial information concerning whether the Cornell defendants had obtained the Dubonts' embryos for experimentation purposes or for testing at the request of the treating physician, Dr. Ricardo H. Asch. Dr. Viega stated that certain embryos she had obtained for research purposes had been inadvertently destroyed and she had mentioned this to Dr. Asch. Dr. Asch purportedly obtained some replacement embryos for Dr. Viega, so she could continue her research project. In her

---

[1] The record variously refers to the first name of the doctor as either "Ana" or "Anna" and to her last name as either "Viega" or "Veiga." We are unable to ascertain her correct name.

declaration concerning the Viega statement, Attorney Blum stated she needed to take Dr. Viega's deposition and the motion for summary adjudication was premature.

During argument of the motion, Attorney Blum explained that she was "in the midst of discovery and [had] obtained some documents from the N.I.H. [National Institutes of Health] . . . which inquire[d] into Cornell about their use of embryos . . . ." She further stated she was trying to obtain information pertaining to the positions of various governmental agencies on the applicability of certain laws when human embryos are subjected to testing. When she was responding to the judge's question about whether the Cornell defendants had done experimentation, as opposed to testing at the request of the primary care physician, Blum said: "And all I can do is give you at this point in time the information that I have regarding what I've gotten from the N.I.H., and their correspondence with various parties that I still need to depose. Santiago Munne and Anna Viega, people who [*sic*] I have not deposed yet.[2] So once I take depositions of these individuals, I can say to this court, well, this is what he says he was doing." Later she stated: "But that's why I said this is premature. I don't have that information yet. All I have is information from a regulatory agency that says tell me." After hearing argument from counsel on August 20, 1999, the court took the motion under submission.

---

[2] At a glance, one can see apparent discrepancies between the Viega statement and the Munne declaration attached to the moving papers. Dr. Munne's declaration said there was a planned research project between UCI and Cornell: "Dr. Viega had apparently described the test to Dr. Asch, who expressed interest in having some of his patient's pre-embryos tested to determine whether their failure to become pregnant was due to chromosomal abnormalities in their pre-embryos." But Dr. Viega's unsworn statement told a quite different tale: "When I designed and planned the research I performed at Cornell in 1994, I never had in mind to use any embryos from UCI or assist the Center for Reproductive Health . . . in any way. [¶] Due to a misfortunate situation wherein the embryos I had transported from Spain were distroyed [*sic*] when the nitrogen leaked from transport containers, I was given embryos by Terri Ord after I mentioned to Dr. Asch what happened."

While Attorney Blum had not been particularly articulate as to what kind of information she had from the N.I.H. or any other regulatory agency, the Dubonts made that clear to the court before it ruled on the motion. On September 15, 1999, they filed supplemental points and authorities in opposition to the motion. The Dubonts indicated their counsel had recently obtained some critical information concerning the issue of whether the Cornell defendants had obtained the legally required consent before proceeding to perform research on their embryos. They attached copies of letters from J. Thomas Puglisi, Ph.D., Chief, Compliance Oversight Branch, Division of Human Subject Protections, Office for Protection from Research Risks, Department of Health and Human Services, N.I.H. and Gregory W. Siskind, M.D., Associate Dean of Cornell University Medical College.

The Puglisi letter to Dr. Siskind at Cornell University Medical College stated the Office for Protection from Research Risks had received "news reports suggesting possible noncompliance with Department of Health and Human Services (HHS) regulations for the protection of human research subjects (45 CFR 46)." In that letter, the N.I.H. requested an investigation into the matter. The N.I.H. requested, inter alia, "[a] copy of the complete . . . file for any research protocol utilizing frozen embryos or other materials obtained from the University of California Irvine Center for Reproductive Health, including informed consent documents . . . ."

Thereafter, Dr. Siskind wrote: "In response to your letter . . . , an inquiry was conducted into allegations that Dr. Santiago Munne . . . and Dr. Jacques Cohen . . . had conducted research on pre-embryos received from Dr. Ricardo Asch, head of an in vitro fertilization unit in California, . . . without consent of the patients whose pre-embryos were used." Dr. Siskind continued with this admission: "Dr. Munne failed to obtain documentation that appropriate patient consent had been obtained for this use of the patients' pre-embryos. Dr. Munne acknowledges the need for patient consent but relied completely upon undocumented oral communication, via telephone, to assure

himself that consent for this use of the pre-embryos had been granted by the patient. Consent would be required irrespective of whether the analytic procedures were regarded as research or as patient care . . . ." In the supplemental points and authorities, the Dubonts argued these letters showed the Cornell defendants violated both federal and state consent laws and reiterated the request that the motion be denied.

On September 16, 1999, the court granted the motion in a minute order. The next day, the Cornell defendants served a copy of the minute order on Attorney Blum.

On September 29, 1999, a formal order granting the motion for summary adjudication and an order of dismissal pursuant to Code of Civil Procedure section 581d were filed. Apparently unaware of this, the Dubonts filed a motion for reconsideration on October 1, 1999.

To support the motion for reconsideration, the Dubonts supplied more evidence indicating that further discovery was required in order to gather facts necessary to oppose the motion for summary adjudication. Attorney Blum declared that on September 23, 1999, she discovered new evidence which directly contradicted Dr. Munne's statements set forth in his declaration in support of the motion for summary adjudication. An attached declaration of Dr. Asch, who said he was then in Mexico City, corroborated the chain of events as described by Dr. Viega. He confirmed that Dr. Viega had indicated a need for replacement embryos for research purposes and that he had asked his laboratory chief if they could help out. He further stated he understood the laboratory chief did then supply embryos to Dr. Viega. Dr. Asch also declared that he did not ask Dr. Viega to conduct testing. Furthermore, he stated he had never even heard of Dr. Munne at the time he met with Dr. Viega and he never requested Dr. Munne "to analyse [*sic*] anything from the Center for Reproductive Health." (Underscoring omitted.) In her declaration, Attorney Blum explained that Dr. Asch's declaration was previously unavailable because Dr. Asch and his attorney were unwilling to cooperate

until September 23, 1999, after being advised of the ruling on the motion for summary adjudication and receiving a copy of Dr. Munne's declaration which contained several misrepresentations. Dr. Asch's declaration was not provided to Attorney Blum until September 27, 1999.

Also in support of the motion for reconsideration, Attorney Blum reminded the court of the newly obtained investigational correspondence from the N.I.H. and the responsive correspondence from the Associate Dean of the Cornell University Medical College, admitting consent for use of the embryos was required but had not been obtained. She declared that she had obtained copies of the correspondence only after having filed the opposition to the motion for summary adjudication.

On October 7, 1999, the Cornell defendants served a notice of entry of the dismissal order on the Dubonts. On October 22, 1999, the trial court heard oral argument on the motion for reconsideration. At the hearing, the court asked Attorney Heather Higson, representing plaintiffs to the litigation, why she had not discovered the Siskind letter earlier. She explained that she had "propounded discovery to Cornell University early on . . . , and included in that discovery was [a] request for production of documents. . . . The introductory statements [in that request for production] included all letters and correspondence which would have included this letter." She further stated that even though she had filed a motion to compel, and did receive some additional documents in response, the university never provided her with a copy of the Siskind letter. In a stunning revelation, Attorney Higson elucidated that the Siskind "letter was finally sent to [her] by The Los Angeles Times" only after she had filed her opposition to the summary judgment motion. In response to further questioning from the court about her acquisition of a copy of the Puglisi letter, Attorney Higson confirmed that she had obtained it by the same method as the Siskind letter — a gratuitous mailing from The Los Angeles Times. Attorney Blum was not questioned separately on her acquisition of the letters.

The court purportedly denied the motion for reconsideration on the merits. In their brief the Dubonts acknowledge the trial court lost jurisdiction to consider the motion for reconsideration once the dismissal order had been entered, and ask that this court consider the content of the motion for purposes of demonstrating the existence of other evidence that could have been presented had the trial court continued the motion for summary adjudication.

On November 1, 1999, this court received a writ petition from the Dubonts, asking that we order the superior court to set aside its September 29, 1999 order granting the motion for summary adjudication. The Dubonts did not call to this court's attention the fact that the order of dismissal had been filed. Therefore, this court did not realize that the time for filing a notice of appeal from the dismissal order was running. In December 1999, the Cornell defendants mentioned the dismissal order to this court, in their opposition to the writ petition. Shortly thereafter, the Dubonts, in their reply to the opposition, requested that this court treat their writ petition as a notice of appeal, were this court inclined to deny the writ petition.

By order filed December 16, 1999, this court, intending to hear the matter as an appeal, denied the petition and granted the Dubonts 20 days from the date of the order to file a notice of appeal. The Dubonts filed a notice of appeal on December 27, 1999. The Cornell defendants then filed a motion to dismiss, in the appellate proceedings. They assert that this court had no power to extend the time for filing a notice of appeal.

In retrospect, the language in our December 16, 1999 order was improvident. Appellate courts cannot, of course, grant appellants extra time to file notices of appeal. However, we did not recognize that the clock was running on any appeal the Dubonts might have had until quite late in the game. While we sometimes chastise litigants for inartful wording, we must now plead guilty to the same offense. Our intention was to hear the matter as an appeal, and we expressed our intention in a most

inartful way. While we purported to give an extension of the time for filing a notice of appeal, our only real intention was to set the clock running for the filing of appellate briefs and records. The equities are best resolved by liberally construing the writ petition, filed November 1, 1999, as a sufficient notice of appeal under California Rules of Court, rule 1(a)(2).[3] That makes the appeal from the dismissal order served on October 7, 1999, to be timely.

In an effort to dissuade us from this construction, the Cornell defendants quote *In re Marriage of Patscheck* (1986) 180 Cal.App.3d 800, 804 for the proposition "there is no authority for treating an untimely appeal as a writ petition. [Citation.]" However, we are not treating a notice of appeal as a writ petition, we are treating a writ petition as a notice of appeal. The Cornell defendants assert there is not one case authorizing that course of action. Not so. It has been done before. (See *Washington v. Board of Supervisors* (1993) 18 Cal.App.4th 981, 983.)

On appeal the Dubonts claim, among other things,[4] the trial court erroneously refused to permit further necessary discovery before ruling on the summary adjudication motion.

II

DISCUSSION

A. *Nature of Summary Judgment*

As we recently stated in *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 394-395: "'Though often said, it appears necessary to again reiterate that a summary judgment is a drastic measure which deprives the losing party of trial on the merits.' [Citations.] The right to a jury trial, embodied in article I, section 16 of the

---

[3] California Rules of Court, rule 1(a)(2) provides in pertinent part: "The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed."

[4] Because we resolve the case on this issue, we need not address the Dubonts' other contentions.

California Constitution, is at stake. (See Troutman, *The Jury Trial* (1977) 51 Fla. B.J. 331, 332 [cautioning against too liberal summary judgment as an 'abandonment of the hard-fought principles of our forefathers who believed that no amount of economy and efficiency is adequate consideration for a fair and impartial jury' trial].) Some cases refer to the constitutional rights argument as being a creature of 'older decisions,' because the summary judgment statute (Code Civ. Proc., § 437c) has been held constitutional. [Citation.] We agree there is 'nothing in the summary judgment procedure [that] is inherently unconstitutional. [Citations.]' [Citation.] But technical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers."

B. *Right to Continuance*

As we further explained: "To mitigate summary judgment's harshness, the statute's drafters included a provision making continuances — which are normally a matter within the broad discretion of trial courts — virtually mandated '"upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." [Citation.]' [Citation.] That is, Code of Civil Procedure section 437c, subdivision (h) declares: 'If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition *may* exist but cannot, for reasons stated, then be presented, the court *shall* . . . order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.' (Italics added.) The drafters' inclusion of the italicized words 'may' and 'shall' leaves little room for doubt that such continuances are to be liberally granted. Indeed, as one court noted, 'an opposing party can compel a continuance of a summary judgment motion' by making a declaration meeting the requirements of section 437c, subdivision (h). [Citation.]" (*Bahl v. Bank of America, supra,* 89 Cal.App.4th at p. 395.)

The Cornell defendants contend the Dubonts failed to comply with those requirements because they did not specifically request a continuance of the motion. Given the unusual circumstances of this case, we find that argument unpersuasive. The transcript of the hearing reflects an atypical discussion which included reference to cryogenically preserved embryos, experimental testing on human subjects, cloning and chromosomal deformities. At one point the court and counsel discussed other matters ranging from a recently passed statute that makes stealing embryos a crime to the Nuremberg trials. In a classic understatement, the judge remarked the issues involved were not "standard." Thus, when opposing counsel explained why evidence could not be presented and stated numerous times that more discovery was needed, the court faced the rare circumstance when the language of Code of Civil Procedure section 437c, subdivision (h) had to be taken literally. Subdivision (h) does not contain a requirement that counsel articulate a request for a continuance, and on the particular facts of this case, we decline to read such a requirement into the provision. Under these unusual circumstances, the statute required the court to deny the motion or order a continuance whether or not counsel had specifically requested a continuance.

The Cornell defendants disagree. They try to prop up their argument by citing three cases which do not provide the argued support, and are distinguishable by their facts: *Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445; *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349; and *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241.

Zamudio revolved around a written contract, only portions of which had been produced in discovery. The lack of a complete contract was "mentioned in the points and authorities filed in opposition to summary judgment." (*Zamudio v. City and County of San Francisco, supra,* 70 Cal.App.4th at p. 454.) But the appellant omitted to explain the failure to file a motion to compel production of the entire contract. The court observed that the reference in the points and authorities to an incomplete copy of the

contract did not serve as either an evidentiary objection or a request for a continuance. (*Ibid.*)

In the case before us, however, no failure to file a motion to compel is involved and the Dubonts have done more than merely mention one incomplete piece of evidence. In Attorney Blum's declaration, she stated she needed to depose Dr. Viega and urged that the motion for summary adjudication was premature. At oral argument, she again reiterated the need to take additional depositions, those of Drs. Munne and Viega and persons having knowledge of the N.I.H. investigation, and again argued the motion was premature. Attorney Blum's declaration and argument may be liberally construed as requests for a continuance. To do so would not run afoul of the other authorities the Cornell defendants cited. Both the *A & B Painting* and *O'Laskey* courts showed a willingness to read the attorney declarations liberally as a request for a continuance. (*A & B Painting & Drywall, Inc. v. Superior Court, supra,* 25 Cal.App.4th at pp. 356-357; *O'Laskey v. Sortino, supra,* 224 Cal.App.3d at p. 251.)

In the instant case the Dubonts did not, indeed, use the magic word, "continuance." Instead the attorney repeatedly informed the court the summary adjudication motion was premature because more discovery was necessary. Attorney Blum went into exquisite detail regarding what discovery was necessary and why it could not be accomplished before the motion was heard: Dr. Viega was on vacation, and her return date was not known; Dr. Asch was in Mexico City and did not decide to cooperate with the Dubonts until late September 1999; and the federal government had an ongoing investigation.

In its formal order granting the motion for summary adjudication, the court stated the Cornell defendants were not the Dubonts' treating physicians and therefore owed no duty to them to obtain their consent to perform the tests or to inform them of the test results. It further explained that "[o]nly if the Defendants had been performing medical experiments and/or research . . . might there even be an issue of disclosure. . . .

[N]o competent or admissible evidence was presented that Defendants were conducting research on the embryos." With this statement, the court turned a blind eye to the information the Dubonts were trying to collect and present showing that yes, indeed, the Cornell defendants were conducting research on the embryos. While the information from Dr. Viega, the N.I.H. and the Associate Dean of Cornell University Medical College itself may not have been in admissible form when the motion for summary adjudication was heard, the Dubonts expressed to the court their need to complete discovery so as to be able to present evidence in admissible form. Certainly it appeared that facts essential to justify opposition, to show that the Cornell defendants were conducting research on the embryos, might exist.

We will not disturb the trial court's decision absent an abuse of discretion. (See *Adoption of D. S. C.* (1979) 93 Cal.App.3d 14, 24-25.) The trial court's discretion, however, is not absolute: """The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citations.]" (*Martin v. Alcoholic Bev. etc. Appeals Bd.* (1961) 55 Cal.2d 867, 876.) An exercise of discretion is subject to reversal on appeal """where no reasonable basis for the action is shown." [Citation.]' [Citation.]" (*Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 522.)

III

DISPOSITION

The motion to dismiss is denied. Because the trial court granted the motion for summary adjudication after it appeared that facts essential to justify opposition might exist, we reverse. We

remand to the trial court for necessary discovery before ruling on the motion for summary adjudication. Appellants shall have their costs on appeal.

MOORE, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.