DailyNews

There Is No Such Thing As a 'Corporate Representative' or 'Person Most Qualified' Witness

Tim Kowal *February 03, 2023*

A trial court relied on a hearsay declaration when it granted summary judgment to Avon in this talcum powder case alleging asbestos exposure. There is a growing

consensus that trial court rulings on evidence are reviewed under the more lenient abuse-of-discretion standard, even on summary judgment. And *Ramirez v. Avon Products, Inc.* (D2d8 Jan. 23. 2023 no. B313982) --- Cal.Rptr.3d --- (2023 WL 354915) supports that consensus.

But the court still reversed. There are limits to what qualifies as evidence that can shift the burden of proof in the summary judgment context to the nonmoving party.

The important thing to take away from the published *Ramirez* opinion is that corporate litigants cannot get around hearsay and foundation problems by designating their witnesses "corporate representatives" or "persons most qualified." These are deposition tools, not end-runs around the rules of evidence.

Ramirez alleged asbestos exposure back in the 1970s. Avon offered the declaration of a vice president, Lisa Gallo. But Gallo had only worked at Avon since the 1990s. Ramirez objected that Gallo lacked foundation and her declaration was hearsay. But the trial court overruled the objections, concluding that Avon had designed Gallo as its corporate representative and person most qualified on the topics. And besides, the events happened 50 years ago—it's not like Avon is likely to still have people who were working there in the '70s.

There is no such thing as a "person most qualified" or "corporate representative" witness outside the deposition context.

The Court of Appeal did not buy the trial court's rationale that Avon could get around the foundation and hearsay objections by dubbing its witness a "corporate representative" or "person most qualified." "The Evidence Code," the Court of Appeal observed, "recognizes only two types of witnesses: lay witnesses and expert witnesses." And Avon did not offer Gallo as an expert.

The court went on: "There is no special category of 'corporate representative' witness, as the trial court suggested. There is no exemption from the Evidence Code for a witness who has conducted an 'independent review,' whatever the trial court meant by that phrase."

What about a "person most qualified"? Attorneys are familiar with this concept when seeking information from an entity defendant via deposition. If Ramirez had deposed Avon for the same information, Avon presumably would have offered Gallo to testify

to the same matters as in her declaration. So why can't Avon do the same thing without the deposition?

The answer, the court explained, is that the tools available in deposition are for discovery—not to give the deposed party an end-run around the Evidence Code. "[T]he tools of discovery are intended to benefit the party utilizing those tools. The purpose of a deposition is not to aid the party whose witness is being deposed; it is to aid the opposing party taking the deposition. More specifically, the primary purpose of section 2025.230 is not to aid corporate entities. Rather, it is intended to simplify discovery for the party seeking information from a corporation."

Hold on a minute. Something about this, Avon says, seems unfair. So the plaintiff can depose Gallo and get all this information, and then the plaintiff can use the bits of Gallo's testimony it likes as party admissions against Avon? But then when Avon wants to use Gallo's testimony, it's barred on hearsay and foundation grounds? That, protests Avon, can't be how it works.

But it *is* how it works. The court explained that, contrary to Avon's suggestion, this is not unusual in the context of entity litigants. Natural persons are subject to the same rules: the answers a party-witness gives in discovery may be used against the party as party admissions—but the same party-witness can't get self-serving testimony into evidence on her own behalf just by blurting them out at deposition. She has to follow the rules of evidence. The same applies to corporations.

As the appellate court concluded here: "What Avon is in effect suggesting is that if a party deposes a corporate entity, the corporate entity is no longer bound by the rules of evidence at any subsequent trial or hearing. This is simply nonsense."

Ok, but what about the fact that the plaintiff's allegations are 50 years old? By preventing Avon from offering testimony about matters from the 1970s, the court has prevented Avon from defending itself.

The court acknowledged that the age of the alleged acts poses problems. But Avon is forgetting that it is the defendant who bears the burden of that proof: "If anything, the problem is more acute for the Ramirezes, who bear the burden of proving the contents of those products."

Finally, the court analyzed the documents attached to Gallo's declaration, and noted they all predated Gallo, they all contained hearsay and even hearsay-upon-hearsay, and that none of them satisfied the business-records exception. And even if the were admissible, they did not establish that Avon's products never contained asbestos.

Admitting the Gallo declaration and the attached exhibits was an abuse of discretion.

Avon forfeited its argument based on the plaintiff's factually devoid discovery responses by not sufficiently raising this in the trial court.

Ok, so Avon had trouble disproving plaintiff's allegations. But can the plaintiff prove them? The plaintiff has the burden of proof, after all. And this can be a basis for summary judgment for the defendant.

Avon argued that the plaintiff's discovery responses were factually devoid, implying the plaintiffs have no evidence to prove their asbestos claims.

But Avon made only a conclusory argument about this in its MSJ papers. And the record indicated that there was an ongoing discovery dispute at the time of the motion for summary judgment. "In light of this dispute," the court held, "it would be unreasonable to infer a lack of evidence from any missing, devoid or incomplete responses."

Besides, Avon's arguments were not fully developed on appeal. "We may and do 'disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.'" (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153.)

Comment

The court went out of its way to note that there is a split of authority on the standard of review of evidentiary objections made in connection with a motion for summary judgment, with one side holding that the standard is de novo. The *Ramirez* panel did not go this direction, however, and sided with the majority of courts reviewing evidentiary rulings in the summary judgment context for abuse of discretion.

But the opinion is not clear how the trial court *abused its discretion*, as opposed to merely commit legal error, in overruling the hearsay and foundation objections to Avon's evidence—other than that the evidence was, in fact, hearsay and devoid of foundation. The court lingered on one of the exhibits to the declaration, a report putatively authored by a Dr. Pennisi, but which "resembles a press release." Presumably, the court felt that this exhibit especially helped Avon, and was especially objectionable. The court concluded that "[t[he trial court abused its discretion in admitting all these hearsay documents, but the abuse of discretion was particularly egregious in the case of the Pennisi statement."

The upshot is that the distinction between de novo and abuse of discretion when it comes to evidentiary rulings may come down to more of a mood or nuance than a legally measurable difference.

This article was originally published on the website of Thomas Vogele & Associates, APC.

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