Aguilar and the New Face of Summary Judgment
Our Embattled Right to Trial By Jury

By Bill Daniels

28 Advocate 28 (July/August 2001)

Winston Churchill once observed: "In [its Twelfth Century] origin the jury was a royal instrument of administrative convenience: the King had the right to summon a body of men to bear witness under oath about the truth of any question concerning the royal interest." 2 Churchill, A History of the English Speaking Peoples, The Birth of Britian: The English Common Law, at 217 (1956).

In 1787, founding father Alexander Hamilton wrote "The friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The term "palladium" comes from the Greek and refers to a statue of the god Pallas, whose preservation was believed to ensure the safety of Troy.

On June 15, 2001, the California Supreme Court declared: "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite they allegations, trial is in fact necessary to resolve their dispute." Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826 (Mosk, J.).

So much for palladiums of free government.

Since March of this year, our Supreme Court and the Court of Appeal have published four important opinions redefining the law of summary judgment. In reverse chronological order, they are: Aguilar v. Atlantic Richfield Co. (June 15, 2001); Bahl v. Bank of America (May 23, 2001) 107 Cal.Rptr.2d 270; Krantz v. BT Visual Images, L.L.C. (May 18, 2001) 107 Cal.Rptr.2d 209; and Basich v. Allstate Ins. Co. (March 16, 2001) 105 Cal.Rptr.2d 153.

Out of these four opinions, two are most charitably described as anti-consumer, anti-jury. Aguilar, the sole decision from the Supreme Court, is now the controlling law regarding the burden of bringing and opposing summary judgment in California. Basich stands for the radical proposition that a party opposing a motion for summary adjudication on punitive damages must meet the same clear and convincing evidence standard that will apply at trial.

On the other hand, Bahl and Krantz inject some balance back into the equation. Bahl holds that strictly adhering to the technical safeguards incorporated into 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 or his or her peers." Krantz, for its part, implies that a summary judgment is not available to a

stonewalling defendant. Both decisions suggest a practical counter to the heightened standards imposed by Aguilar and its like-decided brethren.

The message is clear. As consumer attorneys, we must once meet the challenge by adopting a fresh approach to preparing for and defeating summary judgment. We must do our utmost to ensure our clients may seek justice before a jury of their peers. Still, we must be ever aware that our Twenty-First Century judicial system is showing a decided tilt towards practices once exclusive to Twelfth Century kings.

Settling A Decade Long Debate

Aguilar has its roots in a debate that has raged in our Court of Appeal ever since the Legislature amended Section 437c in 1992 and 1993. As Krantz explained in discussing its own summary judgment analysis four weeks before the Aguilar decision was announced:

> The question before us . . . implicates a procedural controversy earnestly debated within the Court of Appeal over the past decade, without defining relief from our high court. The issue relates to legislative amendments made in 1992 and 1993 to California's summary judgment statute — Code of Civil Procedure section 437c. More precisely, the question asks what is the burden of proof lying on a party seeking summary judgment when that party does not bear the ultimate burden of proof at trial.

Aguilar, then, is the "defining relief" that the Court of Appeal has awaited for almost a decade. Indeed, not only does the decision explain the burden of proof lying on a party who does not bear the burden at trial, Aguilar redefines the entire summary judgment process in light of the 1992-1993 amendments, while at the same time disapproving entire lines of authority that our high court has decided "lack vitality" in light of the Legislative change. The decision also spends time both reconciling and distinguishing California summary judgment law with its Federal counterpart.

The full details of the opinion are best gleaned by a careful reading. However, the bottom line is that consumer attorneys must now be fully prepared to try their cases on paper if they ever hope to ever try their cause before a jury. That means admissible evidence satisfying the burden that the plaintiff would face at trial with sufficient weight to defeat a motion for non-suit or directed verdict. The major difference is in how the burden is described. Rather than a burden of proof, the consumer attorney opposing summary judgment must satisfy a "burden of persuasion," sufficient to persuade the judge that the matter must be decided by a jury.

Absent admissible evidence satisfying the burden of persuasion, which Aguilar says "entails the "establishment" through such evidence of a `requisite degree of belief'" in the judge's mind that "a reasonable trier of fact [might] find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof," your client's right to trial by jury will be checkmated by procedural convenience.

Meeting the Burden of Persuasion

One far reaching impact of Aguilar is the announcement that a party opposing summary judgment is now unambiguously charged with presenting evidence that would, if unopposed, be sufficient to defeat a motion for nonsuit or directed verdict at trial.

This holding was anticipated by the Second District Court of Appeal in Basich v. Allstate Ins. Co. (March 16, 2001), which held that summary adjudication of a punitive damage claim may be overcome only by an opposition presenting clear and convincing evidence of malice, oppression or fraud. Aguilar agrees with the Basich holding, stating:
How each party may carry his burden of persuasion and/or production depends on which would bear what burden of proof at trial. Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not.

Though the burden is one of persuasion rather than proof, as a practical matter this means that it is no longer sufficient to show that there are disputed facts regarding actionable conduct that will support a punitive damage claim. Rather, the practitioner must be prepared to put forward affirmative evidence that a reasonable trier of fact might rely upon in making a punitive award. Since the standard is one of persuasion, interpret that as meaning evidence sufficient to persuade the judge that a reasonable jury could find in your favor.

Gaining Access to the Jury by Invoking Section 437c(h)

In reviewing Aguilar, it is important to remember that it is authored by the late Hon. Stanley Mosk, who was not only a giant of justice, but a steady champion of consumer rights. Given the high court's present makeup, Mosk's authorship should be a sign that Aguilar is not to be read as a radical shift in law, but rather as a pronouncement of the state of summary judgment both in its scope and its limitations.

The limits of summary judgment are, of course, defined by our precious constitutional right to trial by jury. Though that right was initially won with blood and conflict, it is now seems balanced on the point of a pen. Yet the rush to judicial expedience and convenience has not completely overwhelmed the jury right.

Bahl v. Bank of America (May 23, 2001) 107 Cal.Rptr.2d 270 is direct and to the point. In reversing summary judgment where a trial court granted the motion despite clear stonewalling by the defendant, the Fourth District Court of Appeal held that the jury trial right dictates strict technical compliance with Code of Civil Procedure section 437c(h) where there is a showing that facts essential to justify opposition to summary adjudication may exist, even where a party may not have been diligent in its search. Indeed, the court in Bahl held that it was error not to continue a trial where there was a positive showing that additional time was necessary to adequately oppose summary judgment, declaring: "Public policy dictates that disposition on the merits be favored over judicial efficiency."

Interestingly, Bahl recites that familiar axiom that "summary judgment is a drastic measure which deprives the losing party of trial on the merits," but cites no current Supreme Court opinion as authority. Aguilar does not comment on this point, indeed, nowhere is the right to jury trial discussed in the opinion. However, should Bahl remain citable authority, it is a powerful counter to summary judgment proponents rushing to choke off your clients' jury trial right.

Joining with Bahl in support of the civil jury is Krantz v. BT Visual Images, L.L.C. (May 18, 2001) 107 Cal.Rptr.2d 209. The First District Court of Appeal in Krantz reversed summary judgment where the motion was supported only by conclusory declarations and where the moving defendant had engaged in stonewall tactics during discovery.

In Krantz, the defendant moved for summary judgment on the grounds that the plaintiff could not prove it was the alter ego of another party. The motion was based only conclusory declarations by three attorneys and a company executive stating that the alter ego and agency allegations were untrue. The plaintiff filed an affidavit in opposition to summary judgment asserting that during discovery, the defendant "never designated or produced [an affiant], never designated or produced anyone who knew . . . of the relationship between these entities . . . and never produced any documents reflecting the underlying facts of [defendant's] organization, capitalization, or other facts that would be probative on the [alter ego] issue." The trial court granted summary judgment.

The appellate court reversed. It held that it was "unreasonable to expect plaintiff to rebut the declarations filed in support of defendant's motion for summary judgment on the question of agency and alter ego. These issues, of course, are not ones that plaintiff would be expected to have any knowledge of." The court concluded:
[I]t follows that the moving party's "simply pointing to" the absence of evidence supporting plaintiff's position is not in itself enough to obtain summary judgment in its favor. There must be some "affirmative showing" by the moving defendant that plaintiff could not obtain such evidence, before summary judgment would be proper.

This notion of an affirmative showing that a plaintiff is unable to obtain evidence as a condition precedent to summary judgment is echoed in by Justice Mosk in Aguilar.
The defendant must show that the plaintiff does not possess needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff cannot reasonably obtain needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion.

Or, as Bahl explains: "[T]echnical 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 or his or her peers."
Conclusion

Once again, for consumer attorneys the world has changed. A cause that will find its way to a jury must first be presentable on paper in such a fashion that admissible evidence to the relevant burden "of persuasion" can be presented to the trial court.

The annals of jurisprudence are rife with anecdotes of jurists invading the jury's province. The creeping cancer of summary judgment law is a part of that legacy.

Legislation is pending in our Legislature to restore the balance of justice that presently tilts evermore in favor of institutional patricians and their property interests and away from consumers and the hard won liberty interests. As consumer attorneys, we should all vigorously support the efforts of the Legislature to protect our right to jury trial.

In the interim, be forewarned. If vigilance is indeed freedom's price, then we must be ever vigilant of our clients' right to trial by jury.

The authors wish to acknowledge the following Education Committee members who assisted in preparing these articles: Steven P. Goldberg, Elizabeth A. Hernandez, Gerald C. MacRae, Randy H. McMurray, Debra J. Wegman.

***

Bill Daniels regularly publishes a variety of articles and videos to keep you abreast of legal developments and case law that affect our society.

For additional reading and learning:

Checklists, Reading Lists and Connecting the Dots, Connect the dots from planning to success.
The Cost of Bias in the Legal Profession, Bias in the judicial system costs us all.

These previous and other articles/videos can be found in the Learning Center section of www.BillDanielsLaw.com

William A. Daniels is a Trial Attorney with BILL DANIELS | LAW OFFICES, APC, in Encino, CA. His practice focuses on class actions, employment and serious personal injury cases. A graduate of Loyola Law School of Los Angeles, he is a member of the Consumer Attorney Association of Los Angeles Board of governors and a founding member of the Civil Justice Program and the 21st Century Trial School at Loyola. For several consecutive years he has been names a "Super Lawyer" Los Angeles Magazine in Southern California.

He can be reached at William.Daniels@BillDanielsLaw.com; www. BillDanielsLaw.com