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EXPERTS *LIBERALLY CONSTRUED*

The *Garrett v. Howmedica* decision laid open an exception to the *Sargon* opinion, which held that trial courts have a "gatekeeping" responsibility to exclude speculative and unreliable expert opinion testimony

In *Sargon Enterprises Inc. v. University of Southern California*, the California Supreme Court clarified the standard that governs the admissibility of expert opinion testimony under California Evidence Code Sections 801(b) and 802.[1] Following that decision, however, a conflict developed in the law governing the admissibility of expert opinion evidence offered in opposition to a motion for summary judgment.

For decades, courts in California had applied the rule that a party's evidence in opposition to a summary judgment motion must be liberally construed when assessing its sufficiency to create a triable issue of fact. However, in *Garrett v. Howmedica Osteonics Corporation*, Division Three of the Second Appellate District held that this rule of liberal construction also applies when assessing the admissibility of an opposing party's expert opinion evidence.[2] In so holding, the *Garrett* court effectively imposed a relaxed admissibility standard that is at odds with the standard described in *Sargon*. Moreover, *Garrett* also created a conflict with an earlier decision in *Bozzi v. Nordstrom, Inc.*, in which Division Eight of the Second Appellate District held that the rule of liberal construction applies only to sufficiency determinations, not threshold admissibility determinations.[3] The supreme court has not yet resolved this conflict.

Given the extensive use of expert declarations in California summary judgment practice, it is important to examine the purported basis for the *Garrett* rule. The law as it existed before *Garrett* did not directly support the court's decision to extend the rule of liberal construction to admissibility determinations in the summary judgment context. Moreover, two recent admissibility decisions—*Perry v. Bakewell Hawthorne*[4] and *Apple Inc. v. Superior Court*[5]—cast additional doubt on the *Garrett* rule.

A party moving for summary judgment should be aware of the conflict between *Garrett* and *Bozzi*. When presented with

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an argument that the trial court should apply a relaxed standard of admissibility pursuant to *Garrett*, the moving party at a minimum should seek to preserve the issue for appeal. Moreover, there are other practical steps that a moving party may take.

Sargon Clarifies Admissibilty

Sargon arose from a dispute over damages purportedly suffered by a dental company following the University of Southern California's alleged breach of a contract to conduct a clinical study of the company's new implant device. Even though the company was small and had annual profits peaking at only slightly over $100,000, the company's damages expert opined that had the university fulfilled its obligation, the company would have become a worldwide market leader within 10 years, eventually earning profits ranging from $220 million to $1.2 billion. The California Supreme Court held that the trial court properly excluded the expert's lost profits testimony as speculative, given that the expert's damages projections bore no relationship to the company's actual profits and were not based on data from similarly sized and situated companies.[6]

Before the supreme court decided *Sargon*, there was confusion in California law concerning the extent to which a trial court could assess the foundation of expert opinion testimony. California Evidence Code Section 801(b) requires that an expert opinion be based on matter "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." But the courts of appeal did not agree on what this provision meant.

For example, in *Roberti v. Andy Termite & Pest Control*, Division Four of the Second Appellate District suggested that it is improper under Section 801(b) for a trial court to evaluate the information that forms the basis for an expert's opinion as a threshold to admitting that opinion.[7] By contrast, in *Lockheed Litigation Cases*, Division Three of the same appellate district construed Section 801(b) to mean that a trial court must evaluate whether the information relied on provides an adequate foundation for the expert's opinion.[8]

In deciding *Sargon*, the California Supreme Court resolved the conflict in the appellate courts' interpretation of Section 801(b). In affirming the trial court's exclusion of the plaintiff's damages expert, the supreme court explicitly embraced the reasoning in *Lockheed Litigation Cases*, effectively rejected the reasoning in *Roberti*, and confirmed that trial courts have a "substantial 'gatekeeping' responsibility" under Section 801(b) to exclude speculative and unreliable expert opinion testimony.[9] According to the supreme court, the trial court had correctly interpreted Section 801(b) to mean that "'the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.'"[10]

Significantly, the supreme court held that a trial court's gatekeeping obligation derives not only from Section 801(b) but also from Section 802. Section 802 provides that an expert may state "the reasons for his opinion and the matter… upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." Section 802 also provides that the court "may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."[11] The *Sargon* court construed Section 802 to mean that trial courts may look beyond the types of matter on which an expert relies, assess whether an expert's stated reasons support his or her opinion, and create and apply judge-made law restricting the reasons for an expert's opinion.[12]

Although *Sargon* involved the admissibility of expert testimony at trial, the supreme court's discussion of Sections 801(b) and 802 was not limited to that context. On the contrary, the court described the "applicable legal principles" that apply whenever a lower court exercises its discretion to admit or exclude expert opinion evidence.[13] In discussing these principles, the court relied extensively on cases involving admissibility decisions made in the summary judgment context,[14] including the court of appeal's decision in *Lockheed Litigation Cases* and the U.S. Supreme Court's seminal decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[15] *General Electric Company v. Joiner*,[16] and *Kumho Tire Company v. Carmichael*.[17] By relying on these summary judgment cases, the court made plain that its interpretation of Sections 801(b) and 802 applies whenever a party seeks to admit expert opinion evidence, regardless of the procedural context.[18]

Garrett Creates an Exception

Less than four months after the California Supreme Court decided *Sargon*, the Second Appellate District decided *Garrett*. The *Garrett* court effectively created an exception to *Sargon* by imposing a relaxed standard of admissibility on declarations submitted in opposition to summary judgment motions. *Garrett* still remains the only published decision following *Sargon* to explicitly hold that the rule of liberal construction applies to threshold admissibility determinations.

The plaintiff in *Garrett* alleged that he was injured following the fracture of a femoral prosthetic implant. At issue on appeal was whether the trial court erred in granting summary judgment for the defendant after excluding a declaration submitted by the plaintiff's metallurgist expert. In that declaration, the expert stated that he had conducted "extensive examinations" of the prosthesis and concluded that the fractured portion of the device was softer than the "minimum required hardness" in two of three specifications of the American Society for Testing and Materials (ASTM) and less than the "expected hardness" in the third specification.[19] The expert, however, failed to describe the particular testing processes that he used, to more particularly describe the results of that testing, and to identify the ASTM specifications that he had considered.

On appeal, the defendant argued that the trial court properly excluded the expert's declaration because these omissions made it impossible to determine whether the material on which the expert relied supported his opinion, as required by *Sargon*. The court of appeal rejected this argument and emphasized why, in its view, *Sargon* was distinguishable. Specifically, the court explained that "*Sargon* involved the exclusion of expert testimony at trial" following a multi-day evidentiary hearing pursuant to Evidence Code Section 802.[20] The court then explained that "[u]nlike *Sargon*," *Garrett* involved the exclusion of expert testimony presented in opposition to a summary judgment motion without a Section 802 evidentiary hearing.[21]

After distinguishing *Sargon*, the court cited *Jennifer C. v. Los Angeles Unified School District*,[22] and *Powell v. Kleinman*,[23] as support for its conclusion that the rule of liberal construction "applies in ruling on both the admissibility of expert testimony" submitted in opposition to a motion for summary judgment "and its sufficiency to create a triable issue of fact."[24] Relying on these two cases, the court then explained that "a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial."[25] Ultimately, the court applied the rule of liberal construction to hold that the expert's decla-

ration was admissible even though the trial court "could not scrutinize the reasons for [his] opinion to the same extent as did the trial court in *Sargon*."[26]

Conflicts with *Bozzi*

In holding that the rule of liberal construction applies to admissibility determinations, *Garrett* created a conflict with *Bozzi*. The plaintiff in *Bozzi* sued a department store and an escalator manufacturer for personal injuries sustained when an escalator stopped as a result of a power outage. The issue on appeal was whether the trial court erred in granting summary judgment for the defendants after excluding a declaration of the plaintiff's engineering expert. The trial court had held that the expert's opinions were inadmissible because they lacked any factual foundation and were conclusory and speculative.[27]

The court of appeal affirmed. It began its analysis by observing that "[t]he same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment."[28] After acknowledging the rule of liberal construction, the court confirmed that this rule "does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration."[29] As the court emphasized, "only *admissible evidence* is liberally construed in deciding whether there is a triable issue."[30]

Garrett Reexamined

The conflict between *Garrett* and *Bozzi* has been emphasized in two petitions for review to the supreme court.[31] The court, however, has not yet resolved that conflict. Accordingly, there is value in reexamining the purported basis for the *Garrett* court's ruling.

The court in *Garrett* relied on two cases—*Jennifer C. v. Los Angeles Unified School District* and *Powell v. Kleinman*—for the proposition that a trial court should apply the rule of liberal construction when assessing the admissibility of an opposing party's expert opinion evidence. Nevertheless, neither case directly supports that proposition.

Jennifer C. involved a claim for negligent supervision filed against a school district by a student who was sexually assaulted at school. The issue on appeal was whether the trial court erred in granting summary judgment for the defendant after excluding the declaration of the plaintiff's expert on school safety and supervision. The trial court excluded the declaration because the plaintiff's expert was not qualified, and it also found that the expert's opinions concerning the standard of care were conclusory and therefore insufficient to raise a triable issue of fact.[32]

The court of appeal reversed. Significantly, the court did not apply or even mention the rule of liberal construction when reviewing the trial court's qualifications-based admissibility ruling.[33] Instead, the court referenced the rule only "[i]n considering whether [the expert's] opinions were sufficient to raise triable issues of fact."[34] Moreover, the court cited *Powell* not for the proposition that the rule of liberal construction applies to admissibility determinations but rather for the proposition that the rule applies to sufficiency determinations.[35]

Powell was a medical malpractice case arising from damages sustained when the defendants failed to promptly diagnose and treat an injury to the plaintiff's spinal cord. At issue on appeal was whether the trial court properly granted summary judgment for the defendants after excluding the declaration of the plaintiff's expert on the grounds that his opinions were based on unfounded assumptions and flawed reasoning.[36]

As in *Jennifer C.*, the court of appeal reversed. At the outset, the court suggested that it intended to conduct an admissibility analysis.[37] However, the court sidestepped the issue of admissibility and conducted a sufficiency analysis instead.[38] The court began that analysis by taking "guidance from cases analyzing the sufficiency of medical experts' summary judgment declarations."[39] After considering several such cases, the court reaffirmed the rule of liberal construction.[40] The court then applied that rule and concluded that the expert's declaration created "triable issues of fact which preclude summary judgment."[41] Having found triable issues of fact, the court reversed the trial court's judgment without explicitly addressing the threshold issue of whether the expert's opinions were admissible.[42] The court therefore appears to have assumed that because the expert's opinions created triable issues of fact, those opinions necessarily were admissible in the first instance.

In short, while both *Jennifer C.* and *Powell* involved a challenge to a trial court's exclusion of an expert declaration submitted in opposition to a summary judgment motion, the court of appeal in each case applied the rule of liberal construction in the context of a sufficiency analysis, not an admissibility analysis. Thus, neither *Jennifer C.* nor *Powell* directly supports the proposition that the rule of liberal construction should apply to admissibility determinations. At most, these cases exemplify the tendency of some courts to conflate the distinct concepts of admissibility and sufficiency—or as one court put it, they "show a confusion in the minds of some courts between the admissibility of a circumstance in evidence and its weight when admitted."[43] But admissibility and sufficiency are not the same. As the California Supreme Court explained nearly 150 years ago in *Yates v. Smith*, "[t]he question of the admissibility of evidence is quite different from the question of its value, weight or effect."[44]

In holding that the rule of liberal construction applies to admissibility determinations, the *Garrett* court therefore appears to have read *Jennifer C.* and *Powell* too broadly. The court also does not appear to have considered the history and purpose of the rule or the impact of legislative amendments to the Code of Civil Procedure.

Eagle Oil

The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion was announced more than 70 years ago in *Eagle Oil & Refining Co. v. B.H. Prentice*.[45] By explaining that "[t]he issue to be determined…is whether or not" the party opposing summary judgment "has presented any facts which give rise to a triable issue," the *Eagle Oil* court confirmed that the rule as conceived applied to sufficiency determinations, not admissibility determinations.[46] In fact, when the court announced the rule, there was no strict requirement that a declaration opposing summary judgment be based only on admissible evidence.[47] It was not until the 1973 amendments to the Code of Civil Procedure that the legislature first required that declarations offered in opposition to summary judgment be based on admissible evidence.[48]

Moreover, when it imported the rule of liberal construction into California law, the *Eagle Oil* court viewed summary judgment as a "drastic" procedure that "should be used with caution."[49] That view, however, changed in 1992 and 1993, when the legislature amended the Code of Civil Procedure to bring California summary judgment law "closer" to its federal counterpart and thereby "liberalize" the granting of summary judgment motions.[50] Therefore, when the court decided *Garrett*, summary judgment was understood to be "a particularly suitable means to test the sufficiency" of the plaintiff's case.[51] Imposing a relaxed admissibility standard on a declaration submitted in opposition to a motion for summary judgment is inconsistent with the legislature's intent that

trial courts should grant such motions more readily.

In addition, applying a rule of liberal construction to admissibility determinations is complicated by Evidence Code Section 300, which provides that the code "applies in every action" except as otherwise provided by statute. According to the Law Revision Commission Comments, Section 300 "makes the Evidence Code applicable to all proceedings conducted by California courts except those court proceedings to which it is made inapplicable by statute."[52] As one court noted, "the Law Revision Comment to Section 300 resolves any conceivable ambiguity in the statutory language."[53] By operation of Section 300, therefore, Sections 801(b) and 802—as interpreted by *Sargon*—apply with as much force at summary judgment as at trial. Moreover, Civil Procedure Code Section 437c(d) states that declarations supporting and opposing summary judgment "shall set forth admissible evidence." Neither that provision nor any other statute permits a trial court to "liberally" construe a declaration for admissibility purposes.

Perry and *Apple* Considered

The supreme court's decision in *Perry* and the court of appeal's decision in *Apple* now cast additional doubt on whether, following *Sargon*, it is appropriate to apply the rule of liberal construction when assessing the admissibility of a declaration submitted in opposition to a motion for summary judgment.

The issue in *Perry* was whether the trial court had erred in granting summary judgment for the defendant after refusing to consider the declaration of a plaintiff's expert who had not been timely designated. On appeal to the supreme court, the plaintiff relied on *Kennedy v. Modesto City Hospital*.[54] Unlike the court of appeal in *Perry*, which had affirmed the trial court's judgment, the court in *Kennedy* reversed the trial court's entry of summary judgment for the defendants following that court's refusal to consider the declaration of a plaintiff's expert who had not been timely designated. In so ruling, the *Kennedy* court reasoned that the expert disclosure statutes contemplated "'the exclusion of expert testimony offered by a noncomplying party at trial, not at a pretrial proceeding.'"[55] Because the *Kennedy* court believed that "'[a]dmissibility at trial is not necessarily the same as admissibility at a summary judgment proceeding,'" the court reasoned that "'evidence made inadmissible at trial by reason of the express procedural bar [of the disclosure statutes] does not necessarily make the evidence inadmissible in a summary judgment proceeding.'"[56]

In affirming the court of appeal's judgment in *Perry*, the supreme court expressly disapproved of *Kennedy* and rejected its underlying assumption that admissibility means something different at trial than at summary judgment.[57] The court reasoned that under Section 437c(d), a declaration submitted in opposition to a summary judgment motion "'shall set forth admissible evidence.'"[58] The court then cited approvingly to *Bozzi* for the proposition that this provision "requires the evidence presented in declarations to be *admissible at trial*."[59] Based on this interpretation of Section 437c(d), the court concluded that if expert opinion evidence is subject to exclusion at trial based on a party's noncompliance with the expert disclosure statutes, that evidence perforce cannot be considered at summary judgment.[60]

By emphasizing that evidence cannot be considered at summary judgment unless it would be admissible at trial, *Perry* undermines the *Garrett* court's reasoning. As explained, the *Garrett* court distinguished *Sargon* and applied the rule of liberal construction to hold that the plaintiff's expert's testimony was admissible at summary

judgment even though the court had no basis to assess whether the testimony would be admissible at trial. But *Perry* now makes clear that expert opinion evidence is admissible at summary judgment if and only if it would be admissible at trial. Because there is no basis to apply a rule of liberal construction when assessing the admissibility of expert opinion evidence at trial, there likewise is no basis to apply that rule when assessing the admissibility of expert opinion evidence submitted in opposition to a summary judgment motion.

Unlike *Perry*, *Apple* was not a summary judgement case. Instead, the issue in *Apple* was whether the *Sargon* admissibility standard applied to expert opinion evidence submitted in connection with class certification motions. The defendant challenged the materials and methodologies on which the plaintiffs' experts relied for their damages opinions and repeatedly urged the trial court to apply *Sargon*. The court refused that invitation, however, and "expressed concern that applying *Sargon* would 'turn class cert[ification] motions into these massive hearings.'"[61] In granting class certification, the court reaffirmed its belief that *Sargon* did not apply and that the defendant's expert challenges presented "issues for trial."[62]

The court of appeal reversed. The court began its analysis by emphasizing that a trial court "may consider only *admissible* expert opinion evidence at class certification" and that "[t]he Evidence Code provides the framework for the admissibility" of such evidence.[63] The court then explained that the supreme court in *Sargon* provided "definitive guidance to courts considering the admissibility of expert opinion evidence" and that the court's interpretation of Sections 801(b) and 802 "applies wherever the Evidence Code does."[64] In holding that *Sargon* applies equally at class certification as at summary judgment and trial, the *Apple* court confirmed that "[t]here is only one standard for admissibility of expert opinion evidence in California, and *Sargon* describes that standard."[65] Moreover, the court reasoned that exercising a gatekeeping role in each of these procedural contexts "serves a similar salutary purpose."[66]

The *Garrett* Footnote

Although the *Apple* court did not purport to address the conflict between *Garrett* and *Bozzi*, the court did discuss *Garrett* in a footnote. The court noted that *Garrett* applied the rule of liberal construction to hold that "an expert declaration in opposition to summary judgment should not have been excluded even though the expert's description of his methodology was relatively thin."[67] The court then explained that "[e]ven accepting *Garrett*'s analysis," no rule of liberal construction applies at class certification.[68] By describing *Garrett* in this manner, the court suggested that it may view *Garrett* with disfavor.

More importantly, the reasoning in *Apple* is at odds with that in *Garrett*. In holding that the rule of liberal construction applies when assessing both the admissibility of expert opinion evidence submitted in opposition to summary judgment as well as the sufficiency of that evidence to create a triable issue of fact, *Garrett* conflated the distinct legal concepts of admissibility and sufficiency and created what effectively is a different and lower standard for admission of certain expert testimony than that described in *Sargon*. But similar to *Bozzi*, *Apple* reaffirms what the supreme court recognized in *Yates* more than a century ago—namely, that admissibility and sufficiency, while related, "are distinct" legal issues.[69] Moreover, similar to *Perry*, *Apple* now confirms that following *Sargon*, "there is only one standard for admissibility of expert opinion evidence in California."[70] Moreover, by observing that *Sargon* applies "at class certification and otherwise," *Apple* also

confirms that this singular admissibility standard applies regardless of the procedural context in which expert opinion evidence is proffered.[71]

In addition, *Apple* explicitly rejects the rationale that led the *Garrett* court to distinguish *Sargon* and apply the rule of liberal construction to a threshold admissibility determination. As explained, the *Garrett* court distinguished *Sargon* on the grounds that the trial court there had conducted a Section 802 evidentiary hearing to assess the admissibility of expert opinion testimony at trial. However, the *Apple* court reasoned that *Sargon* is not distinguishable on that basis.[72] Indeed, the court confirmed that the *Sargon* admissibility analysis is "not limited" to the trial context but also applies at summary judgment and class certification, and that "nothing in that opinion mandates or even encourages holding such a hearing for every expert, at trial or otherwise."[73] Because it rejects *Garrett*'s stated basis for distinguishing *Sargon*, *Apple* necessarily calls into question the *Garrett* court's decision to extend the rule of liberal construction to admissibility assessments.

Implications for Practitioners

As noted, the California Supreme Court has not resolved the conflict between *Garrett* and *Bozzi*. When presented with an argument that the trial court should apply a relaxed standard of admissibility pursuant to *Garrett*, the moving party at a minimum should seek to preserve the issue for appeal. Nevertheless, there are other practical steps that the moving party could take, depending on the circumstances.

For example, when noticing its motion, the moving party might consider requesting that—before ruling on the motion—the court conduct an evidentiary hearing under Evidence Code Section 802 to assess the purported basis of any expert opinion evidence submitted by the opposing party. A court unquestionably has authority to conduct a Section 802 hearing in the summary judgment context. If the court conducts the requested hearing, the rationale that led the *Garrett* court to distinguish *Sargon* and liberally construe the opposing party's expert declaration arguably should no longer apply.

Alternatively, the moving party might consider asking the court to defer ruling on its motion until after the party has had a reasonable opportunity to depose the opposing party's expert. Courts have allowed discovery in such circumstances.[74] With a more developed evidentiary record, a party moving for summary judgment may be able to show why the opposing party's expert opinion evidence is inadmissible regardless of whether the trial court applies the rule of liberal construction. ■

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[1] Sargon Enters. Inc. v. University of S. Cal., 55 Cal. 4th 747 (2012).
[2] Garrett v. Howmedica Osteonics Corp., 214 Cal. App. 4th 173 (2013).
[3] Bozzi v. Nordstrom, Inc., 186 Cal. App. 4th 755 (2010).
[4] Perry v. Bakewell Hawthorne, LLC, 2 Cal. 5th 536 (2017).
[5] Apple Inc. v. Superior Ct., 19 Cal. App. 5th 1101 (2018).
[6] *See* Sargon, 55 Cal. 4th at 776-78.
[7] Roberti v. Andy Termite & Pest Control, 113 Cal. App. 4th 893, 898, 904-06 (2003) (reversing the trial court's exclusion of plaintiff's experts' testimony and reasoning that the court improperly applied "a threshold reliability test" akin to that applied by federal courts under *Daubert v. Merrell Dow Pharmaceuticals Inc.* (509 U.S. 579 (1993)) when it found that "extrapolation of these animal studies to humans is speculative").
[8] Lockheed Litig. Cases, 115 Cal. App. 4th 558, 564, 566 (2004) (upholding the trial court's exclusion of an expert's general medical causation opinion because the epidemiologic study on which he relied "provided no reasonable basis" for his opinion that plaintiffs' alleged exposure to certain chemicals resulted in an increased risk of cancer).
[9] Sargon, 55 Cal. 4th at 769-70.
[10] *Id.* at 770 (quoting Lockheed Litig. Cases, 115 Cal. App. 4th at 564)).
[11] *Id.*
[12] *See* Sargon, 55 Cal. 4th at 771.
[13] *Id.* at 773.
[14] *See id.* at 770-72.
[15] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).
[16] General Elec. Co. v. Joiner, 552 U.S. 136 (1997).
[17] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
[18] By quoting approvingly from *Daubert*, *Joiner*, and *Kumho*, *Sargon* also made plain that contrary to *Roberti*, the foundational assessment required by sections 801(b) and 802 should draw on the admissibility principles developed by the federal courts. *See generally* P. Choate & K. Larson, *Sargon Enterprises v. USC: A Step Toward Daubert*, Law360 (Mar. 20, 2014). That said, *Sargon* confirms that the "general acceptance" test described in People v. Kelly (17 Cal. 3d 24 (1976)) and People v. Leahy (8 Cal. 4th 587 (1994)), still applies to a narrow category of expert testimony—*i.e.*, that which is "based on new scientific techniques." Sargon, 55 Cal. 4th at 772 n.6.
[19] Garrett v. Howmedica Osteonics Corp., 214 Cal. App. 4th 173, 187 (2013).
[20] *Id.* at 188.
[21] *Id.* at 189.
[22] Jennifer C. v. Los Angeles Unified Sch. Dist., 168 Cal. App. 4th 1320, 1332-33 (2008).
[23] Powell v. Kleinman, 151 Cal. App. 4th 112, 125-26, 128-30 (2007).
[24] Garrett, 214 Cal. App. 4th at 189.
[25] *Id.*
[26] *Id.*
[27] *See* Bozzi v. Nordstrom, Inc., 186 Cal. App. 4th 755, 762 (2010).
[28] *Id.* at 761.
[29] *Id.*
[30] *Id.* (emphasis in original).
[31] *See* Garrett v. Howmedica Osteonics Corp., Petition for Review, No. S210018 (Cal. Apr. 16, 2013); Liu v. Superior Ct., Petition for Review, No. S211042 (Cal. May 30, 2013).
[32] *See* Jennifer C. v. Los Angeles Unified Sch. Dist., 168 Cal. App. 4th 1320, 1331 (2008).
[33] *See id.* at 1332.
[34] *Id.*
[35] *See id.*
[36] *See* Powell v. Kleinman, 151 Cal. App. 4th 112, 120-21 (2007).
[37] *See id.* at 122 ("Because the court sustained Dr. Kleinman's evidentiary objections and excluded Dr. Meub's declaration, we review the court's ruling for abuse of discretion.").
[38] *See id.* at 122-23.
[39] *Id.* at 123.
[40] *See id.* at 126.
[41] *Id.* at 130.
[42] *See id.* 130-31.
[43] People v. Graves, 137 Cal. App. 1, 10 (1934).
[44] Yates v. Smith, 40 Cal. 662, 669 (1871).
[45] Eagle Oil & Ref. Co. v. B.H. Prentice, 19 Cal. 2d 553 (1942).
[46] *Id.* at 556.
[47] *See id.* (explaining that declarations submitted in opposition to summary judgment motions "need not necessarily be composed wholly of strictly evidentiary facts").
[48] *See* Overland Plumbing, Inc. v. Transamerica Ins. Co., 119 Cal. App. 3d 476, 484 (1981) (citing Craig Corp. v. County of Los Angeles, 51 Cal. App. 3d 909, 915 (1975) for the proposition that the 1973 amendment "reverse[d] a line of California summary judgment decisions that permitted a summary judgment motion to be denied by a counterdeclaration suggesting triable issues of fact based on conclusions of law and other inadmissible evidence").
[49] Eagle Oil, 19 Cal. 2d at 556.
[50] Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 848 (2001).
[51] Caldwell v. Paramount Unified Sch. Dist., 41 Cal. App. 4th 189, 203 (1995).
[52] *Id.*, Law Revision Comm'n Comments.
[53] Jauregi v. Superior Ct., 72 Cal. App. 4th 931, 939 (1999).
[54] Kennedy v. Modesto City Hospital, 221 Cal. App. 3d 575 (1990). *See also* Perry v. Bakewell Hawthorne, LLC, 2 Cal. 5th 536, 539 (2017).
[55] Perry v. Bakewell Hawthorne, LLC, 2 Cal. 5th 536, 540 (2017) (quoting Kennedy, 221 Cal. App. 3d at 582).
[56] *Id.*
[57] *See id.* at 543.
[58] *Id.* at 541 (quoting Code. Civ. Proc. §437c(d)).
[59] Perry, 2 Cal. 5th at 541 (emphasis in original) (internal citations omitted).
[60] *See* Perry, 2 Cal. 5th at 541-42.
[61] Apple Inc. v. Superior Ct., 19 Cal. App. 5th 1101, 1111, 1114 (2018).
[62] *Id.*
[63] *Id.* at 1117 (emphasis in original) (internal citations omitted).
[64] *Id.* at 1118-19.
[65] *Id.* at 1119.
[66] *Id.*
[67] *Id.* at 1119 n.3.
[68] *Id.*
[69] *Id.* at 1124 ("Admissibility is governed by the Evidence Code, as interpreted by *Sargon* and other authorities. Substantiality [of expert opinion evidence at the appellate court level] is a rule of appellate review, with specific criteria for expert opinion evidence.").
[70] *Id.* at 1119.
[71] *Id.* at 1125.
[72] *See id.* at 1118-19.
[73] *Id.* at 1118-20.
[74] *See* Hernandez v. Superior Ct., 112 Cal. App. 4th 285, 298 (2003); Sanchez v. Hillerich & Bradsby Co., 104 Cal. App. 4th 703, 718 (2002).