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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JODY B. GUTIERRES et al.,

Plaintiffs and Appellants,

v.

BALCH PETROLEUM BUILDERS AND
CONTRACTORS, INC. et al.,

Defendants and Respondents.

F067024

(Super. Ct. No. 09CECG04550)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

David Feldman for Plaintiffs and Appellants.

Gordon & Rees, Miles D. Scully, Matthew G. Kleiner, and J. Todd Konold for Defendants and Respondents.

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This is an appeal from a judgment of the Superior Court of Fresno County entered in favor of defendants/respondents Balch Petroleum Builders and Contractors, Inc. (Balch Petroleum), and Roebbelen Contracting, Inc.

Defendants were hired to remove an underground diesel fuel storage tank outside the office building of Pacific Bell Telephone Company (Pacific Bell) at 4781 East Tulare Avenue in Fresno, California. The project, which lasted from December 17, 2007, to February 15, 2008, involved the use of a diesel-powered backhoe. Plaintiffs/appellants Jody¹ and Daryl Gutierrez sued defendants for negligence and loss of consortium, alleging that operation of the backhoe near the building's air intake ventilator subjected Jody, a Pacific Bell employee, to carbon monoxide while she was working indoors on December 17, 2007; December 18, 2007; and January 16, 2008. At trial, Timothy Morrison, an industrial hygienist retained by defendants as an expert witness, opined that Jody was not exposed to hazardous levels of carbon monoxide from the backhoe. Thereafter, the jury pronounced by special verdict that defendants were not negligent. The court later denied plaintiffs' motion for new trial.

On appeal, plaintiffs contend that defendants violated Code of Civil Procedure² section 2034.300, subdivisions (b), (c), and (d)³ and the court should have granted their motion in limine to exclude Morrison's trial testimony. In affirming the judgment, we conclude that the court's denial of this motion did not constitute an abuse of discretion.

¹ Jody passed away on September 21, 2013.

² Subsequent statutory citations refer to the Code of Civil Procedure.

³ Plaintiffs do not expressly cite section 2034.300, subdivision (d), but nonetheless assert that Morrison "was not made available for deposition."

BACKGROUND⁴

On August 13, 2012, defendants moved for summary judgment. In support of their motions, they submitted Morrison's declaration, which was executed on August 9, 2012, and read:

"5. Since earning a Master of Science in Environmental and Occupational Health at California State University, Northridge in 1989, I have amassed over twenty-four years of professional experience resulting in my current position as a principal of Pacific EH&S Services, Inc. As part of my training and experience, I have performed indoor and outdoor air monitoring surveys for contaminants, conducted site hazard assessments, evaluated ventilation systems and other engineering controls, developed and conducted training programs as it relates to varying exposure guidelines, and generally worked in the field of health and safety management.

"6. Due to my knowledge, training and experience, I am familiar with the standards of care for the evaluation of workplace exposures to toxic substances, including, but not limited to those published by the State of California, Department of Industrial Relations, Division of Occupational Safety and Health (Cal-OSHA) in Title 8

"7. As a consequence of my knowledge, training and experience, I am familiar with Cal-OSHA Title 8, Section 5155, 'Airborne Contaminants,' which establishes the requirements for controlling employee exposures to airborne contaminants at places of employment in the State of California. When evaluating employee exposures to hazardous and toxic substances, Certified Industrial Hygienists ... rely on Cal-OSHA's regulations, and in particular, those pertaining to Permissible Exposure Limits (PELs), for guidance and requirements regarding allowable levels of exposure in the workplace.... PELs are regulatory requirements imposed by Cal-OSHA, ... [and] represent concentrations of airborne contaminants to which nearly all workers may be exposed daily during a 40-hour workweek for a working lifetime without adverse health effects. Additionally, Cal-OSHA ... ha[s] ... established Ceiling Limits for various contaminants, which are values that cannot be exceeded at any time or for any duration. Carbon monoxide has a Cal-OSHA 8-hour time-

⁴ The record consists of an appellants' appendix in lieu of the clerk's transcript (see Cal. Rules of Court, rule 8.124) and a partial reporter's transcript.

weighted average ... PEL of 25 parts per million (ppm) and a Ceiling Limit of 200 ppm....

“8. It is accepted knowledge that carbon monoxide is produced during incomplete combustion processes in internal combustion engines. However, while all engines can produce carbon monoxide when combustion is incomplete, diesel engines run in the presence of an excess of air (as opposed to gasoline-powered equipment) and they nearly always produce less than 1,000 ppm of carbon monoxide. In newer machinery, typically less than 5 ppm carbon monoxide is produced. [¶] ... [¶]

“10. Based on my review of the materials, [Jody’s] alleged exposures occurred on December 17, 2007 between the hours of 3:00 p.m. and 4:30 p.m., on December 18, 2007 between the hours of 8:00 a.m. and 9:00 a.m., and on January 16, 2008 for an approximate 20 minute period. In all, the total exposure claimed by [Jody] amounts to approximately 2 hours and 50 minutes over the course of three days. My review of the discovery materials reveals that [Jody] believes that she was exposed to invisible toxic substances on these dates, specifically diesel fumes and/or carbon monoxide, as a direct result of the operation of a diesel-powered backhoe outside her place of employment. [Jody] further believes that these exposures caused her to experience a variety of adverse health effects

“11. Also, based on my training and experience, my review of case specific materials, and my knowledge of the scientific literature and regulations, it is my opinion that [Jody’s] alleged exposure to carbon monoxide was not hazardous, and to the contrary, is generally equivalent to background carbon monoxide levels. If a diesel-powered backhoe released nothing but pure carbon monoxide from its exhaust system, which would equate to an airborne concentration of 100% carbon monoxide, equally expressed as 1,000,000 ppm carbon monoxide, it is estimated that approximately 3 cubic feet per minute (cfm) of carbon monoxide would be released into the atmosphere from the backhoe’s exhaust. In this case, the outdoor air intake was measured and found to have a volumetric air flow rate of approximately 75,000 cubic feet per minute of outside air entering it when it was fully open. If all of this carbon monoxide entered [Pacific Bell’s office building] by way of the outdoor air intake that was located near the outdoor work area where the underground tank removal project was known to have occurred, and it was then dispersed into 75,000 cubic feet of air flowing through the outdoor air intake, carbon monoxide would exist at a concentration of 0.00004% of the atmosphere, or 0.4 ppm, just inside the outside air intake at a location where complete mixing of the outside air and the carbon monoxide had occurred. This value of carbon monoxide would not be hazardous, and to the contrary, is generally

equivalent to background carbon monoxide levels in California. Even if the backhoe at issue released pure carbon monoxide from its exhaust, which is not the case here, and all of the carbon monoxide produced over the course of ... an afternoon, traveled directly into the building in a single instant, the concentration of carbon monoxide inside the building would have been approximately 0.001% or 10 ppm. This concentration ... does not rise to an impermissible level. This example illustrates that [Jody] could not have been overexposed to carbon monoxide inside the building because even in the worst case scenario, overexposure to carbon monoxide would not have occurred.

“12. Calculations for diesel exhaust, diesel fuel, or any individual constituent of diesel fuel or exhaust ... would reveal similar results. This is because the potential volume of the hazardous emissions from a common backhoe cannot, under any foreseeable circumstance, rise to the level required to introduce sufficient contaminant[s] into a building of this size, having the ventilation system that it has such that it will create an exposure risk related to the inhalation of diesel combustion products. Additionally, with respect to the diesel exhaust particulate, it should also be noted that the building’s heating, ventilation, and air-conditioning [HVAC] system is equipped with a very substantial pre-filtration unit and a second more efficient bag filtration system, which collectively would reduce airborne diesel fume concentrations significantly before the outside air potentially carrying it would ever be delivered into the building exposing anyone inside. [¶] ... [¶]

“16. Based on my education, experience, training, and review of the available scientific literature and the case materials, it is my opinion, based on a reasonable degree of scientific probability, that [Jody] was not exposed to diesel fumes and/or carbon monoxide related to the operation of diesel-powered equipment outside [Pacific Bell’s office building] on December 17, 2007, December 18, 2007, or January 16, 2008, at concentrations that are known to cause any adverse health effects”

On August 30, 2012, plaintiffs served a notice to take Morrison’s deposition. On September 10, 2012, defendants served written objections, which read:

“Plaintiffs’ Notice is in violation of ... section 2034 et al., in that it is premature and improperly seeks disclosure of expert witness information prior to the time allotted under California law. However, without waiving said objection, [defendants] agree[] to produce Mr. Morrison for one deposition, and one deposition only, on a mutually agreeable date and place.”

Karen Sullivan and Stacey Dippong, defendants' attorneys, remarked in a separate September 10, 2012, letter:

“[W]e note that the[] deposition notice[] [is] in violation of ... section 2034 et seq., as [it] call[s] for the premature disclosure of expert information. Expert discovery has not yet commenced in this matter. The parties are not required to designate experts until October 5, 2012....⁵ [¶] We are mindful of the fact that Mr. Morrison executed a declaration in this matter, which was produced in support of our clients' motions for summary judgment.... [W]e will only offer Mr. Morrison for deposition once on this matter. (Plaintiffs cannot depose him once for the purposes of opposing the motions for summary judgment, and once at a later time during expert discovery.)... Mr. Morrison is available on **October 1st, 2nd, and 3rd** for his deposition.”

Morrison was deposed on October 1, 2012, for almost two hours.⁶ When he was asked by David Feldman, plaintiffs' attorney, whether he gave “all of [his] opinions,” he answered, “All the opinions that I have thus far, I've given you today.” Next, when Morrison was asked whether “[he] plan[ned] on doing any further work,” he answered:

“I'm not sure it's under my control.... [I]t appears that there might be some work to do after other experts have been deposed[.] I've had a chance to review their transcripts. [¶] I might need to do more work to evaluate their thoughts, opinions, or there may be meetings that will be held with other experts, or things could come up that we need to do more work on. But I don't have a plan ... for that per se yet. [¶] ... [¶] ... [T]here will be need for it after further depositions occur. For sure I'm going to want to review, at least, [what plaintiffs'] expert who's opposite me ... has to say so that I can evaluate [his] opinions”

Sullivan, who was present, added:

“Mr. Feldman, as you know, we produced Mr. Morrison before the expert designation with regards to the opinions that are set forth in his declarations. We'll be producing him again at a later time.”

⁵ On October 31, 2011, defendants served a demand for exchange of expert witness information and expert reports and writings. The demand was renewed on September 7, 2012.

⁶ The appellants' appendix contains a two-page excerpt of the deposition transcript.

On October 5, 2012, defendants served their expert witness designations. Morrison was identified as a retained expert. The accompanying expert witness declarations read:

“7. **Timothy J. Morrison, C.I.H.**

“(a) Qualifications: Mr. Timothy J. Morrison is an ABIH-Certified Industrial Hygienist with [a] graduate degree in Environmental and Occupational Health. He is experienced in the areas of industrial hygiene, safety, environmental air monitoring, health and safety management, radiation safety, and disaster recovery planning....

“(b) General Substance of Testimony: Mr. Morrison is expected to testify about the science and art of retrospective exposure analysis, principles of risk analysis and exposure and dose assessment. Mr. Morrison is expected to offer testimony regarding the alleged exposures to the chemical at issue in this case, including but not limited to the type, route, frequency and duration, and concentration of such exposures. Mr. Morrison will also testify as [to] industry standards, custom and practice, applicable regulations, inspection and testing methods, and results. Finally, Mr. Morrison may offer opinion testimony in the nature of critiques of the assumptions and methodology employed by, and opinions offered from, plaintiffs’ experts in relevant fields.

“(c) Mr. Morrison has agreed to testify at trial and will be sufficiently familiar with this action to submit a meaningful oral deposition, including any opinion and its basis that Mr. Morrison is expected to give at trial.

“(d) Mr. Morrison’s fee for deposition and trial testimony is \$402.00 per hour from portal to portal.”

Feldman requested dates for deposing defendants’ experts in an October 18, 2012, email.

In an October 30, 2012, letter, defendants advised that Morrison was available for deposition on November 8, 2012; November 9, 2012; November 12, 2012; and November 13, 2012. Feldman replied in an October 31, 2012, email:

“I already took Mr. Morrison’s deposition. If he has additional opinions not offered at his deposition please tell me what they are. Any further deposition on new opinions will have to be at Defendants’ cost.”

In a November 2, 2012, letter, Dippong commented:

“... Mr. Morrison’s deposition on October 1, 2012, before expert designations, was limited to the declaration that he executed in support of defendants’ motions for summary judgment. We stated this on the record at Mr. Morrison’s deposition.... Furthermore, Mr. Morrison, himself, stated that he may perform further work in this case after other experts are deposed.... [¶] Defendants are not obligated and will certainly not agree to pay for plaintiffs to take Mr. Morrison’s deposition. Defendants’ expert designations provide the scope of Mr. Morrison’s opinions and testimony in this matter. If plaintiffs wish to take Mr. Morrison’s deposition pursuant to defendants’ expert designations, please let us know by the end of the business day on November 2, 2012, which of the following dates work best: November 8, 2012; November 9, 2012; November 12, 2012; and November 13, 2012. If we do not hear from you by that time, we will assume that you are not proceeding with his deposition.”

Feldman countered in a November 2, 2012, email:

“You represented that plaintiff[s] will only have one shot at taking Mr. Morrison’s deposition[;] now you have changed you[r] position. When I took his depo it was with that understanding. If he has new opinions you are obligated to inform me of them and make him available at your cost.”

In a November 6, 2012, letter, Dippong reiterated that Morrison was deposed for a limited purpose on October 1, 2012, and was available for another deposition on the dates mentioned in earlier correspondences. Feldman indicated in a November 7, 2012, email that he could depose Morrison at his Santa Monica, California, office on November 12, 2012. No deposition was subsequently conducted. In a November 14, 2012, letter, Sullivan stated that Morrison was available for deposition on November 16, 2012, and November 19, 2012, either by telephone or in-person in Orange County, California. Feldman did not respond.

On November 15, 2012, the court denied defendants’ motions for summary judgment. On the same day, plaintiffs moved in limine to (1) “preclude ... Morrison from offering any testimony that goes beyond the scope of his October 1, 2012 deposition”; (2) “exclude testimony based upon materials not reviewed or provided at [Morrison’s October 1, 2012,] deposition”; (3) “prohibit defendant[s] and their counsel from mentioning, interrogating upon, or in any other manner conveying to the jury, any opinions of the expert other than those stated at the deposition of the expert”; and (4)

“instruct [defendants’] counsel to advise all witnesses ... [¶] ... [n]ot to mention, refer to, or attempt to convey to the jury in any manner, either directly or indirectly, any of the facts mentioned in this motion, without first obtaining permission of the Court outside the presence and hearing of the jury; and [¶] ... [n]ot to make any reference to the fact that this motion has been filed.” On December 3, 2012, the court denied plaintiffs’ motion. Trial commenced on December 10, 2012.

On January 8, 2013, Morrison testified that carbon monoxide toxicity is influenced by concentration and length of exposure. In this case, with regard to concentration, he considered factors such as the size of Pacific Bell’s office building, the HVAC system, and the backhoe used in the course of the underground tank removal project. The building had a volume of 150,000 cubic feet, equating to 150,000 cubic feet of air inside. Michael J. Wintheiser, a professional engineer retained by defendants as an HVAC expert, explained the HVAC system to Morrison:

“[A]fter speaking to [Wintheiser], I learned what the air intake rates were into the building, the general size of the outside air intakes, that there were numerous supply registers throughout the entire building, that it was, generally speaking, an open-air type of configuration, all of it -- not perfectly, but my review of the diagrams and then speaking to [Wintheiser], I believed that there would be a very good mixing and distribution of air inside the building. [¶] ... [¶]

“... [G]enerally speaking, I learned that outside air comes into the building in the morning or at night; around 8:00 or 9:00 [a.m.], it shuts off.... [T]he building continues to circulate air. It may bring in a small amount of outside air during the daytime. Then, around 3:00 [p.m.], the system kicks back on and starts drawing outside air into the building again....”

Morrison reviewed photographs of defendants’ various backhoes and deposition transcripts. He also spoke to Tom Balch, Balch Petroleum’s president. Morrison determined that defendants utilized “a John Deere [1998 or 1999] model 410-E diesel-powered backhoe,” a “modern, efficient, four-cylinder backhoe with pretty stringent

requirements for smoke emissions.” The vehicle’s exhaust pipe has a three-inch diameter and “point[s] straight up” “about nine feet up off the ground.”

Feldman objected to Morrison’s testimony and renewed the motion in limine. He argued:

“Well, you know, there is ... an attempt here, an obvious attempt, to circumvent the discovery process.... [Defendants are] constantly trying to push in ... all of this work that [Morrison] did after his deposition, which ... is the same type of work he would have had to have done for his deposition. There is no difference -- not one iota in the difference in the type of work Mr. Morrison would have had to have done for ... his declaration in support of the motion for summary judgment and his testimony here today. So it’s a blatant attempt to bypass. [¶] ... [Morrison] should have to stick to his deposition, and he should have to stick to all the work that he had done until ... October 1st, 2012, and not be allowed to then do additional work, take photos, and conversations that he never had beforehand”

The court denied the renewed motion:

“In review, you were offered, Mr. Feldman, the opportunity to redepose Mr. Morrison in spite of the first letter that said he’s only available once[;] they reiterated several times you could redepose him, and you chose not to.”

On January 9, 2013, Morrison testified that the “easiest” and “most reliable way” to determine the levels of carbon monoxide emitted from defendants’ backhoe “is to simply measure the backhoe in question.” He hired Sierra Environmental, Inc. (Sierra), an environmental health and safety consulting firm, to conduct the test on January 4, 2013. Morrison detailed the findings:

“The backhoe in question was tested for carbon monoxide above the exhaust with the engine at idle, which is 900 rpm[,] at 1,500 rpm, which is the range that ... [the] forklift would have been operated ... on this job, and then at 22 or 2,500 rpm. [¶] ... [W]e tested it directly above the stack, the exhaust, at one foot, two feet, and three feet [¶] ... [¶] ... The heaviest or highest concentration was 28 [ppm] directly above the exhaust, at the one foot mark directly above it. [¶] ... [¶] ... The numbers dropped off very rapidly, down to about eight or ten [ppm]. I could look at a graph and give you exact numbers, but that’s the basic range at two feet out. [¶] And then another three feet out, ... it was essentially zeros. We got one result

that was a one. And the instrument trickles back and forth between zero and one frequently. So it was essentially a background at three feet.”⁷

Morrison explained the diminution:

“[T]he exhaust comes out with some force, so it’s being pushed up and away. And then ..., as the air around the area mingles with it, it’s going to dilute it very rapidly.... The second it hits the atmospheric air, it starts diluting.”

Citing the prior testimony of plaintiffs’ own expert, Morrison stated that the backhoe had been 10 to 20 feet away from the building’s air intake ventilator.

On cross-examination, Morrison acknowledged that the conclusions outlined in his August 9, 2012, declaration were derived from mathematical calculations instead of actual measurements, which were not available then. When asked whether Sierra tested the backhoe “in close proximity to a vent sucking in the outside air,” he answered:

“I know it wasn’t, and it wasn’t because the vents are irrelevant. The vent does not have the ability, contrary to what other people have suggested, to reach out and grab this stuff and pull it in. It doesn’t have that kind of capacity. [¶] ... [¶] ... I’ve done ventilation testing my whole career. The capture velocity on a vent of this size -- if you reached out, it would be a couple feet max.”

Morrison added that maintenance records of defendants’ backhoe leading up to December 17, 2007, suggested that the machine had been consistently serviced. Furthermore, based on a conversation with Tom Balch, he believed that the backhoe’s condition did not change significantly between December 17, 2007, and January 4, 2013.

DISCUSSION

I. Standard of review

“We generally review the trial court’s ruling on a motion to exclude an expert’s opinion for abuse of discretion.” (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950 (*Boston*)). “The discretion of a trial judge is not a whimsical,

⁷ Sierra composed a January 4, 2013, memorandum incorporating these findings. Plaintiffs moved this two-page document into evidence.

uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action' [Citations.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; see *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1107 ["[D]iscretion is always delimited by the statutes governing the particular issue."].) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 ["When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."].)

II. Relevant law

Pursuant to the Civil Discovery Act (§ 2016.010 et seq.), "any party *may* obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence" (§ 2017.010, italics added; see *Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161, 1164 ["[M]ay' is quite obviously permissive. It means that a party who wants to can conduct discovery. If he doesn't want to, he doesn't have to."]; see also *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 434 [discovery "[is] essentially self-executing"]). "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.]" (*Boston, supra*, 170 Cal.App.4th at p. 950.)

“The Supreme Court has noted that the need for pretrial discovery is greater with respect to expert witnesses than ordinary fact witnesses because the opponent must prepare to cope with the expert’s specialized knowledge.” (*Boston, supra*, 170 Cal.App.4th at p. 951, citing *Bonds v. Roy* (1999) 20 Cal.4th 140, 147 (*Bonds*)). “The Legislature responded to this need by enacting detailed procedures for discovery pertaining to expert witnesses” (*Boston, supra*, at p. 951, citing § 2034.210 et seq.), which “allow[] 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, supra*, at pp. 146-147). Section 2034.210 provides:

“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 to the following extent:

“(a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person ... whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

“(b) If any expert designated by a party under subdivision (a) ... has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under Section 2034.260.

“(c) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in subdivision (b) in the course of preparing that expert’s opinion.”

Once the demand is served, all parties “shall exchange information concerning expert witnesses in writing” (§ 2034.260, subd. (a)) and “all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210” (§ 2034.270) by the date specified in said demand (§§ 2034.260, subd. (a), 2034.270).

“If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration” (§ 2034.260, subd. (c).) The declaration must contain:

“(1) A brief narrative statement of the qualifications of each expert.

“(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

“(3) A representation that the expert has agreed to testify at the trial.

“(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

“(5) A statement of the expert’s hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.” (*Ibid.*)

Section 2034.300, also known as the “exclusion sanction” (*Boston, supra*, 170 Cal.App.4th at p. 949), cautions:

“[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:

“(a) List that witness as an expert under Section 2034.260.

“(b) Submit an expert witness declaration.

“(c) Produce reports and writings of expert witnesses under Section 2034.270.

“(d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).^[8]”

⁸ “On receipt of an expert witness list from a party, any other party *may* take the deposition of any person on the list.” (§ 2034.410, italics added.)

III. Analysis

Plaintiffs claim the court erroneously denied their motion in limine⁹ because defendants “clearly” violated subdivisions (b), (c), and (d) of section 2034.300. We disagree.

a. *Defendants did not violate subdivision (b) of section 2034.300*

The exclusion sanction requires a court to exclude expert testimony when the party offering said testimony “has unreasonably failed to [¶] ... [¶] ... [s]ubmit an expert witness declaration.” (§ 2034.300, subd. (b).) The Supreme Court held that this provision “applies when a party unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of [former section 2034,] subdivision (f)(2)[, now section 2034.260, subdivision (c)], including the requirement that the declaration contain ‘[a] brief narrative statement of the general substance of the testimony that the expert is expected to give.’ [Citation.]” (*Bonds, supra*, 20 Cal.4th at pp. 148-149.) The Court explained:

“The phrase ‘expert witness declaration’ does not exist in a vacuum. Rather, under [former section 2034,] subdivision (f)(2)[, now section 2034.260, subdivision (c)], it is a term of art, referring to a declaration that meets each of five separate content requirements. [Citation.] It follows that a party ‘[s]ubmit[s] an expert witness declaration’ within the meaning of [former section 2034,] subdivision (j)(2)[, now section 2034.300,] when it submits a declaration that complies with all of these requirements.... [¶] ... [¶]

“In short, the statutory scheme as a whole envisions timely disclosure of the general substance of an expert’s expected testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial so long as a party has submitted any expert witness declaration whatsoever is inconsistent with this purpose.... [T]he exclusion sanction ... encompasses situations ... in which a party has submitted an expert witness declaration, but the narrative

⁹ A motion in limine to exclude expert testimony may constitute a sufficient manifestation of objection to preserve the issue for appeal. (*Boston, supra*, 170 Cal.App.4th at p. 950.)

statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial.” (*Bonds, supra*, 20 Cal.4th at pp. 145-146, 148-149.)

The record shows that defendants served their expert witness designations on October 5, 2012. Morrison was identified as a retained expert and the accompanying expert witness declarations conformed to the statutory content requirements. In particular, these declarations disclosed to plaintiffs that Morrison would testify “regarding the alleged [carbon monoxide] exposures ..., including ... route ... and concentration of such exposures” as well as “inspection and testing methods, and results.” (See *DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159, 165 [“Although a party is required to “disclose the *substance* of the facts and the opinions to which the expert will testify,” this ‘does not require disclosure of specific facts and opinions.’”]; *Castaneda v. Bornstein* (1995) 36 Cal.App.4th 1818, 1828 [“[W]e ... believe the Legislature intended a ‘brief narrative statement’ containing the ‘general substance’ of an expert’s testimony ... to give the opposing party fair notice of the subject areas the expert would address in trial testimony in order for the opposing party to prepare cross-examination and rebuttal.”], disapproved on other grounds by *Bonds, supra*, 20 Cal.4th at p. 149, fn. 4.) At trial, Morrison enumerated several factors that affected route and concentration, including the size of Pacific Bell’s office building, the HVAC system, the backhoe’s model, service history, and condition, the distance between the backhoe and the building’s air intake ventilator, and the ventilator’s limited capture velocity. He also attested that Sierra’s examination of the backhoe’s carbon monoxide emissions confirmed the rapid dilution of these emissions upon atmospheric contact. Morrison’s testimony, which referred to post-October 1, 2012, consultations, document and photograph inspections, and emission testing, nonetheless expounded upon matters delineated in the expert witness declarations. (See *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1554-1555 [the defendant’s expert should have been permitted to testify that the defendant’s interpretation of an insurance policy’s business-interruption

clause was reasonable in view of industry custom and practice because the expert witness declaration provided sufficient notice that the expert would testify about industry standards relating to the issue of bad faith]; *Jones v. Moore* (2000) 80 Cal.App.4th 557, 566 [a family law expert retained by the defendant in a legal malpractice action may testify that the plaintiff’s ex-husband’s pension plan could not be used as security for a promissory note since the expert witness declaration broadly stated that the expert would testify as to whether the defendant’s representation in underlying marital dissolution proceedings breached the standard of care].) It cannot be excluded on the basis of section 2034.300, subdivision (b).¹⁰

b. *Defendants did not violate subdivision (c) of section 2034.300*

The exclusion sanction requires a court to exclude expert testimony when the party offering said testimony “has unreasonably failed to [¶] ... [¶] ... [p]roduce reports and writings of expert witnesses under Section 2034.270.” (§ 2034.300, subd. (c).) Such reports and writings, “*if any*” (§ 2034.270, italics added), must be exchanged “on the date specified in the demand” (*ibid.*).

Plaintiffs specify that defendants unreasonably failed to produce Sierra’s January 4, 2013, memorandum, which was created approximately three months after the exchange of expert witness information. “Neither [section 2034.270] nor any other [provision] requires that expert witnesses refrain from creating new or additional reports or writings after the specified date [of exchange]” (*Boston, supra*, 170 Cal.App.4th at

¹⁰ To the extent plaintiffs suggest that Morrison disclaimed performing any additional work after October 1, 2012 (see, e.g., *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1519; *Jones v. Moore, supra*, 80 Cal.App.4th at pp. 565-566; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 920), we disagree. Morrison did not affirmatively state such a position. To the contrary, he indicated at his October 1, 2012, deposition—which was taken *before* defendants served their expert witness designations—that “there might be some work to do after other experts have been deposed,” “[he] might need to do more work to evaluate [plaintiffs’ experts’] thoughts[and] opinions,” “there may be meetings that will be held with other experts,” and “things could come up that [h]e need[s] to do more work on.”

p. 951) and “[t]here is no[] ... statutory procedure for turning over expert reports and writings created after the specified date when the rest of the expert witness information was timely produced” (*ibid.*).¹¹ Nonetheless, “section 2034.300 empowers the court to exclude the expert opinion of any witness offered by a party who has *unreasonably* failed to produce expert reports and writings as required by section 2034.270.... If the trial court concludes that a party intentionally manipulated the discovery process to ensure that expert reports and writings were not created until after the specified date, it *may* find the failure to produce the reports and writings was unreasonable and exclude the expert’s opinions.” (*Id.* at p. 952, italics added.)

The record shows that defendants served timely and complete expert witness designations and declarations. They also made Morrison available for deposition.¹² (Cf. *Zellerino v. Brown*, *supra*, 235 Cal.App.3d at pp. 1116-1117 [the plaintiff thwarted legitimate and necessary discovery by supplying late and incomplete expert witness declarations and refusing to make her experts available for deposition].) Plaintiffs, on the

¹¹ To the extent plaintiffs invite us to “declare a rule that expert reports and writings must be created by the specified exchange date or not at all” (*Boston*, *supra*, 170 Cal.App.4th at p. 952), we decline. “We are not at liberty to read into the statute a restriction on such activity where none exists.” (*Ibid.*; see *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 [“In construing the statutory provisions 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. The court is limited to the intention expressed.”].)

¹² Plaintiffs point out that defendants—prior to the exchange of expert witness information—sought to limit Morrison to a single deposition. This restriction would have been improper. (See *ante*, fn. 8; see also *St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540 [“[U]nder the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to a summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert.”].) However, defendants corrected their mistake by making Morrison available for deposition on November 8, 2012; November 9, 2012; November 12, 2012; and November 13, 2012. They also made Morrison available on November 16, 2012, and November 19, 2012, after plaintiffs seemingly reneged on a November 12, 2012, deposition date.

other hand, opted not to depose Morrison again, even though they had the opportunity to do so before the start of trial. (See *Boston*, *supra*, 170 Cal.App.4th at p. 954 [“[T]he opportunity for meaningful deposition is one of the circumstances the trial court should consider when making the reasonableness determination.”].) Instead, they maintained that defendants were obliged to pay for deposition costs. (But see § 2034.430, subd. (b) [the deposing party alone is responsible for paying the expert’s fee].) “The behavior of the party seeking to exclude the expert testimony is relevant to the reasonableness inquiry. If any unfairness ... was exacerbated by the party seeking exclusion, the court is less likely to find the conduct of the party offering the expert to be unreasonable.” (*Boston*, *supra*, at p. 954.) Under the circumstances, the superior court could have concluded that defendants did not purposefully manipulate expert discovery.¹³

c. Defendants did not violate subdivision (d) of section 2034.300

The exclusion sanction requires a court to exclude expert testimony when the party offering said testimony “has unreasonably failed to [¶] ... [¶] ... [m]ake [an] expert available for a deposition” (§ 2034.300, subd. (d).) As noted above, defendants made Morrison available for deposition following the exchange of expert witness information and prior to the start of trial, but plaintiffs chose not to conduct any further discovery.

¹³ To the extent plaintiffs suggest that the court should not have admitted Sierra’s memorandum into evidence, we disagree. Plaintiffs concede that their attorney “made a decision to move the [memorandum] into evidence and then comment on it during cross-examination and closing.” “[A]ppellate courts generally are unwilling to second guess the tactical choices made by counsel during trial. Thus where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.” (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

IV. Conclusion

Defendants did not violate section 2034.300. Therefore, we find the court properly denied plaintiffs’ motion in limine to exclude Morrison’s trial testimony.¹⁴

DISPOSITION

The judgment of the superior court is affirmed. Costs on appeal are awarded to defendants/respondents.

DETJEN, J.

WE CONCUR

POOCHIGIAN, Acting P.J.

PEÑA, J.

¹⁴ Since we find no error, we need not address plaintiffs’ argument concerning prejudice.