

**RECENT DECISION RE EXPERT WITNESS DECLARATION
IN OPPOSITION TO MOTION FOR SUMMARY
ADJUDICATION DOES NOT CREATE A TRIABLE ISSUE OF
FACT WHEN WITNESS HAS MADE CONFLICTING PRIOR,
UNSWORN STATEMENTS**

By Reneé A. Richards
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In Alvis v. County of Ventura (October 20, 2009) 09 C.D.O.S. 12821, Division Six of the Second Appellate District affirmed the trial court's grant of Defendant County of Ventura's motion for summary adjudication (MSA) in a dangerous condition action arising out of a fatal landslide. In addition to design immunity issues which I won't describe in this summary, the court found plaintiff's expert's declaration in opposition to the MSA contained statements that conflicted with a prior statement the expert made in a report to an insurance company about the landslide. Though conflicting statements by experts on each side of a MSA or MSJ typically establish a triable issue of fact, the Alvis court held that because plaintiff's expert's prior, unsworn statements conflicted with his declaration in opposition to the MSA, no triable issue of fact was created.

The Alvis decision goes into great detail about the background of a retaining wall that was built near the site of a landslide in an unincorporated area of Ventura. There was evidence the objective of the wall was not to contain any future slides from the cliff above the planned site of the wall, but to restore access to the nearby County road which had been blocked by landslide debris. After much analysis and planning, the wall was built. About four years after the wall was built, another massive slide occurred, overwhelmed the wall, killed 10 people and destroyed 16 homes. The Alvis family lost their son in the slide and they sued the county for wrongful death, dangerous condition of public property, nuisance, property damage and inverse condemnation. Their complaint was consolidated with 22 other complaints, all of which are referred to as "Alvis" in the decision.

The County moved for summary adjudication on a design immunity theory on all counts except for inverse condemnation. County submitted a detailed declaration by the civil engineer who oversaw the project from its inception. There was evidence that he, on more than one occasion prior to the construction of the wall, stated that the "wall was not designed to prevent future landslides or mud flows." He confirmed the design was thoroughly considered, felt to be appropriate and viable, and was constructed as designed. The County submitted the declaration of another registered civil engineer who was also deputy director of the County's transportation department and who declared it was his opinion the wall was designed in accordance with good engineering practices.

Plaintiffs submitted the declaration of a registered geotechnical and civil engineer, Dr. Singh, in opposition to the motion. Dr. Singh's declaration stated the slide was caused by the fact the wall did not allow proper drainage and "the clayey soil behind the wall became saturated, exerted tremendous forces against the wall and ultimately contributed to the wall's collapse." In his opinion, the saturated soil behind the wall both created the slide and diverted the debris flow which caused plaintiffs' damages.

County objected to Dr. Singh's declaration "on the grounds that its conclusions are without foundation and are contradicted by an earlier report he made." It submitted an additional declaration by a civil and geotechnical engineer in support of its objection; that engineer stated Singh's declaration directly contradicted statements he made in an earlier report to State Farm Insurance, and was itself "internally inconsistent."

The trial court granted County's motion. While it overruled both party's evidentiary objections, it observed that it found "the declaration of Dr. Singh on those issues unconvincing because it consists largely of conclusions without a substantial foundation, is vague and is contradicted in some respects by his prior report written in February of 2005." The matter proceeded to trial on the inverse condemnation action, which was dismissed by plaintiffs during trial.

On appeal, Alvis claimed Dr. Singh's declaration raised a triable issue of fact that required the trial court to deny defendant's motion for summary adjudication. The appellate court noted that in the context of a summary judgment and adjudication proceeding "the moving parties' declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." However, even though the trial court may have admitted Singh's declaration into evidence over defendant's objection, "it found the declaration did not constitute substantial evidence so as to raise a triable issue of fact," a point which appellant's apparently ignored in the opinion of the appellate court.

On its de novo review, the court of appeal affirmed the trial court's findings:

"Most significantly, Singh's declaration asserts that the slide started at the bottom of the cliff when the wall failed. This directly contradicts his prior statement in a report to an insurance company that '[f]ailure started as a landslide in the upper reaches and then flowed at a rapid rate down to the developed area below.' This is not a minor point. Singh's statement that the slide started in the upper reaches of the cliff directly undercuts the premise on which his entire declaration is based. Yet, Singh offers no explanation.

In reviewing motions for summary judgment or adjudication, courts have long

tended to treat affidavits repudiating previous testimony as not constituting substantial evidence of the existence of a triable issue of fact. (Cites omitted.) Singh’s prior statement was not in the form of testimony under oath. But the same reasoning applies. We cannot accept as substantial evidence of a triable issue of fact a declaration that directly contradicts the declarant’s prior statement, where the contradiction is unexplained. We may not ignore this significant contraction.”

It does appear the court was impressed by the fact neither plaintiffs nor their expert attempted to explain or put into some context the prior conflicting statement. It is significant, though, that the court holds a prior, unsworn contradictory statement can render an expert’s declaration (and presumably his or her testimony) incapable of creating a triable issue of fact, particularly where the expert makes no effort to explain the inconsistencies in his opinions. It will be very important to be familiar with any and all statements of opinion a plaintiff’s expert has expressed in a case—whether sworn or unsworn— when making a MSJ or MSA as any variance in opinion can be used to argue the declaration does not constitute substantial evidence of a triable issue of fact.