

Appeal No. **654321**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
TENTH APPELLATE DISTRICT, DIVISION 1

George White,
Plaintiff and Appellant,

vs.

Azure Primo Auto Dealership, Inc.,
Defendant and Respondent.

APPEAL FROM THE JUDGMENT OF THE
SLATE COUNTY SUPERIOR COURT
THE HONORABLE JOAN SMITH, JUDGE
SUPERIOR COURT No. ABC456

APPELLANT'S OPENING BRIEF

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, Rule 8.208

No other person or entity has a financial or other interest in the outcome of this proceeding.

I declare under penalty of perjury under California law that the foregoing is true and correct.

Dated:

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INTRODUCTION

In a surreal Catch-22, the trial court granted defendant's motion for summary judgment, even though the court and all parties knew that there was evidence to support plaintiff's contentions about a disputed issue of material fact. But plaintiff was unable to present that evidence to the court in time because of another (former) defendant's stonewalling.

Plaintiff and appellant George White sued Azure Primo Auto Dealership and Primo Car Corporation after the dealer repaired and/or replaced the transmission in his Primo truck no fewer than six times over a two-month period before the truck ultimately broke down and burst into flames. After White dismissed Primo from the action, Azure moved for summary judgment. It argued that it could not be liable because its expert accident investigator had concluded that the fire was caused by a problem in a wire harness that Azure had never worked on. That opinion was directly contradicted in Primo's investigator's accident investigation report, which concluded that the fire was caused by transmission fluid leaking onto a hot exhaust pipe.

Plaintiff tried to convince Primo's expert to authenticate the report, which Primo had given to plaintiff after it was dismissed, so that plaintiff could present it as admissible evidence in opposition to the summary judgment motion. The trial court agreed to continue the hearing on the motion after plaintiff had subpoenaed the expert and Primo's attorney had finally agreed that its expert would produce a sworn declaration. But when the trial court did not receive the declaration by the next scheduled hearing, as promised, it granted defendant's motion.

The court recognized that plaintiff's counsel had been "sandbagged." Everybody understood the key issue in the case—the cause of the fire—and knew that there was evidence about it that plaintiff had not yet been able to present. Under these facts, the trial court committed reversible error in granting

defendant's motion for summary judgment and ending plaintiff's case.

STATEMENT OF THE CASE

1. Nature of the Action and Relief Sought¹

Plaintiff George White went to defendant Azure Primo Auto Dealership on July 31, 2___, because he was having transmission trouble with his 1995 Primo pickup truck. Azure replaced the transmission. During the next two months, White returned five times to the dealership because of transmission problems, including transmission and hydraulic fluid leaks. Each time, Azure installed yet another rebuilt transmission, either ordered from Primo or cobbled together by Azure mechanics from spare parts, or performed other work on the transmission system. Each time, Azure's staff declared that the problem was fixed. Each time, they were wrong. Finally, on a desolate road, the truck failed and then burst into flames.

On March 14, 2___, White sued Azure and Primo, alleging strict products liability, breach of implied warranties of fitness and merchantability, breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, and negligent infliction of emotional distress.

2. Summary of Facts

On July 31, 2___, White contracted with Azure Primo Auto Dealership for the purchase and installation of a replacement transmission for his 1995 Primo Pickup truck at a cost of \$3,557.10. He picked up his truck on August 3, 2___, and within three days the transmission was malfunctioning again.

On August 6, 2___, White returned the truck to Azure and was told that a

¹ Every fact stated in the original brief was supported by references to the record on appeal, but in the interests of brevity those record cites have been deleted from this sample document.

second replacement transmission would be installed. He picked up the truck on August 14, and the transmission began to malfunction the next day. He returned the truck to Azure on August 15. He was assured that they would fix the problem. White picked up the truck on September 20, but it malfunctioned again within days. He returned to Azure for the fourth time on September 24. When he retrieved the truck, White was once again assured that the problem had been fixed.

Within a few days, the truck was leaking transmission fluid, so White took it back to Azure. The truck was ready on September 31, when Azure's staff again assured White that all leaks had been fixed. They had not. He took the truck into Azure for the sixth time on October 1. One of defendant's service advisors apologized for all the problems, and assured him that the leaks had been fixed.

The culminating event occurred on October 6, 2___, when White was driving the truck after midnight with his fiancé and her daughter in the cab, and towing two of his prized horses in a trailer. Suddenly the truck stopped running, and smoke and flames erupted from the underside. When White jumped out to see what was causing the flames, he observed the transmission dumping out fluid that was on fire. He put out the flames with a fire extinguisher.

White then told Primo about the incident directly, and Primo sent accident investigator John Smith to interview him and inspect the truck.

3. Proceedings in the Trial Court

Primo was eventually dismissed from the action, and White proceeded against Azure Primo Auto Dealership. Azure moved for summary judgment, claiming that there was no issue of material fact concerning its liability because its expert investigator had concluded that the fire in White's truck was caused by an "electrical event" in a wire harness. Azure argued that it could not be liable on any of the causes of action because it had never worked on the wire harness.

In his declaration opposing the motion, White’s counsel stated that he had a copy of a fire investigation report from Primo’s accident investigator, John Smith, which Primo’s counsel had given him after Primo was dismissed. That report concluded that the fire was caused by transmission fluid leaking onto a hot exhaust pipe.² But Smith would not voluntarily cooperate in providing a declaration reiterating the contents of his report or authenticating it. Azure objected that Smith’s fire report was inadmissible due to lack of foundation, and that White’s statement that he saw transmission fluid feeding the fire was either improper lay opinion or improper expert opinion without the expert’s qualification.

The court sustained many of Azure’s evidentiary objections, and granted its summary judgment motion. White moved ex parte under Code of Civil Procedure § 473(b) for an order setting aside the summary judgment order. His counsel noted that, in opposing the summary judgment motion, he had explained why he had been unable to submit a declaration to authenticate Smith’s accident report. He argued that he had made the requisite showing under Code of Civil Procedure § 437c(h) for the court to either deny the motion or grant a continuance. Counsel further stated that Smith was now willing to provide an authenticating declaration, and presented an email from Primo’s counsel suggesting that he prepare an authenticating declaration for Smith’s signature.

The court agreed at the ex parte hearing to set aside the order granting summary judgment *nunc pro tunc*, and to continue the summary judgment motion

² DETERMINATION OF ORIGIN AND POSSIBLE CAUSE
ORIGIN APPEARS TO BE IN AREA OF: Exhaust pipe, near the right side of the transmission.
CAUSE APPEARS TO BE: Transmission fluid on the exhaust pipe.
REASONS FOR STATING ORIGIN AND CAUSE: Owner interview and inspection of vehicle.
AA 33 (emphasis added).

until March 13, 2____, to allow counsel time to produce a declaration authenticating Smith's fire investigation report, which was to be filed by March 9. The court then revised the schedule, stating that the declaration was to be filed by March 2, five days later, with the continued hearing date rescheduled for March 6, as trial of the case was scheduled to start March 13.

The authenticating document was not provided to plaintiff's counsel by March 2, as promised, and thus no declaration could be filed. At the March 6 hearing, White's counsel explained that Primo's counsel had agreed that Smith would appear as a witness at trial and would authenticate the declaration. But at the last minute, after previously assuring counsel that Smith would do so, Primo's attorneys said they were unwilling to have him sign the declaration.

The court told plaintiff's counsel, "You were sandbagged, I understand." But then she declared, "I don't think I have a statutory way out, I mean, unless you can come up with something." "This is the law. I've got to make this ruling." The court then granted the motion for summary judgment.

Notice of entry of the order granting summary judgment for defendant Azure Primo Auto Dealership was entered on March 31, 2____. Notice of entry of judgment in defendant's favor was entered on the same date. Timely notice of appeal was filed May 11, 2____.

STATEMENT OF APPEALABILITY

The trial court's order granting the motion for summary judgment by defendant Azure Primo Auto Dealership under Code of Civil Procedure § 437c, and entering final judgment thereon on March 31, 2____, is appealable as a final order under Code of Civil Procedure § 904.1(a)(1) because it constitutes a final disposition of the case.

ISSUE ON APPEAL

Did the trial court err in failing to either deny defendant’s motion for summary judgment or continue the motion, under Code of Civil Procedure § 473c(h), on the ground that it appeared from the affidavits submitted that facts essential to justify opposition to the motion did exist, but could not, for the reasons stated, then be presented to the court?

STANDARD OF REVIEW

Orders granting motions for summary judgment are ordinarily reviewed de novo. *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474. Denial of a continuance under Code of Civil Procedure § 437c(h) is reviewed for abuse of discretion. *Knapp v. Dougherty* (2004) 123 Cal.App.4th 76, 100.

ARGUMENT

- 1. Code of Civil Procedure § 437c(h) mandates that a continuance be granted or the summary judgment motion be denied on a good-faith showing that a continuance is needed to obtain facts essential to justify opposition to the motion.**

Under § 437c(h)³, continuances—which are normally a matter within the broad discretion of trial courts, are virtually mandated “upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.” *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389,

³ If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

395 (citing *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 803-804).

The *Bahl* court addressed the statutory language in § 437c(h), stating that if facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court “*shall*” deny the motion or order a continuance. This language, the court pointed out, “leaves little room for doubt that such continuances are to be liberally granted.” *Id.* at 395. In fact, in *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, the court stated:

A plaintiff generally cannot defeat a well-founded summary judgment motion without setting forth specific facts controverting the motion. An exception is made for an opposing party who has not had an opportunity to marshal the evidence, and a summary judgment motion will be denied or continued if the opposing party declares that “facts essential to justify opposition may exist but cannot, for reasons stated, then be presented.” Upon such a declaration, the trial court's discretion is strictly limited and a continuance may be mandated. In effect, an opposing party can compel a continuance of a summary judgment motion. [Citations.]

Id. at 770-771.

See also *Fraze v. Seely* (2002) 95 Cal.App.4th 627, 633 (abuse of discretion to refuse to grant a continuance after the plaintiff’s counsel explained that he had not been able to complete extensive discovery due to logistical and scheduling problems).

In *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, the court held that it was reversible error to deny a continuance to consider the plaintiff’s recently discovered additional evidence:

A summary judgment is a drastic measure which deprives the losing party of trial on the merits. To mitigate summary judgment’s harshness, the

statute’s drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated. . . . Where the opposing party submits an adequate affidavit showing that essential facts may exist but cannot be presented timely, the court must either deny summary judgment or grant a continuance.

[Citations.]

Id. at 34-35.

The trial courts discretion to deny a continuance under § 437c(h) is strictly limited. “The issue of discovery diligence is not mentioned in section 437c, subdivision (h), which raises obvious doubts about its relevance.” *Bahl, supra*, 89 Cal.App.4th at 398. Even when a party has not been diligent in searching for the facts through discovery, “the court’s discretion to deny a continuance is strictly limited.” *Id.* at 398. Trial courts must control the pace of litigation and their calendars, yet must abide by the principle of deciding cases on their merits rather than on procedural deficiencies. *Ibid.* “When the two policies collide head-on, the strong policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.” *Ibid.*

1. The declaration plaintiff’s counsel submitted met the requirements for granting a continuance under § 437c, subdivision (h).

The statute requires that the opposing party submit a declaration or affidavit, which may be submitted with the opposition or by ex parte motion. See *Coombs v. Skydiver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270. The declaration must inform the court of how the proposed discovery will lead to facts essential to justify its opposition to the summary judgment motion. *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325-326. For purposes of a continuance under § 437c(h), the opposing party’s declaration must show that: (1)

the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.

White's counsel submitted a declaration complying with the requirements of § 437c(h) as part of White's opposition to the motion, and again in his ex parte motion. AA 44-49; AA 50-53. As counsel explained, not only was there reason to believe that essential evidence to oppose the motion *may* exist, he knew it *did* exist and he actually *had it in his possession*. He had a copy of the fire investigation report from Primo's expert concluding that the fire in White's truck was caused by transmission fluid leaking onto hot exhaust pipes. AA 28-33. Azure and the court knew it existed too, because a copy of the report was attached to his declaration. White lacked only a signed declaration from the expert authenticating it.

It was clear to all that this evidence was essential to White's opposition: it went to the heart of the motion and the *key issue* in the case—the cause of the fire. It directly contradicted the factual basis on which Azure's motion rested as to every one of the seven causes of action, i.e., that Azure could not be liable because the fire source was in a wire harness it had never worked on. This report corroborated White's theory of the case and was the most important evidence he had to establish defendant's liability.

Finally, counsel explained why it could not then be presented: Primo's expert had repeatedly refused to speak with him. Only after he subpoenaed the expert did Primo's counsel relent and agree that its expert would authenticate the report. AA 46:13-22; AA 51:2-16. But at the eleventh hour, no such declaration was provided.

Thus, White provided not one, but two declarations that met the requirements of § 437c(h).

Most of the cases upholding a denial of continuance under § 437c(h)

involved a finding by the appellate court that the affidavits or declarations were not sufficient, usually because the plaintiff wanted to do more discovery, but gave no reason to support the existence of specific material evidence. See, e.g., *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715 (bald assertion that essential facts existed, but no statement as to what those facts may have been); *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510-511 (plaintiff requested continuance to conduct further discovery based on doctor's affidavits speculating that plaintiff's shoulder injury could have been caused by being dropped or his arm being stretched or improperly positioned during surgery). In other cases, the declarations may not have explained why the information sought was essential. See, e.g., *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305 (declaration nowhere set forth what facts appellants hoped to obtain through further discovery or how they were essential to opposing the summary judgment motion).

By contrast, White specified essential evidence that was known to exist, which he could not then produce for lack of an authenticating declaration.

2. The trial court knew that there was a substantial issue of disputed material fact, that plaintiff had essential evidence to support his opposition, and that a former defendant had obstructed his efforts to obtain it, yet granted summary judgment anyway.

Even if White's counsel had not requested it, the trial court still should have exercised its discretion to again continue the summary judgment hearing to allow counsel additional time to have the key fire investigation report authenticated or to depose Primo's expert. The reviewing court must determine whether good cause for a continuance has been established, and must exercise its discretion appropriately in deciding whether a continuance is necessary under the

circumstances. See *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709.

The *Lerma* court found that, even though the plaintiffs had not provided a detailed declaration that sufficiently complied with the requirements of § 437c(h) for a mandatory continuance, the trial court had abused its discretion nonetheless in failing to grant one under the circumstances. *Id.* at 716. The plaintiffs' attorney had been hospitalized for cancer surgery when the summary judgment motion was filed and was unaware of it until he was released from the hospital. The plaintiffs sought a continuance, and explained the circumstances. The court held that the death or serious illness of the plaintiff's attorney was good cause for a continuance, irrespective of § 437c(h) requirements. *Id.* at 718. See also *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246-1247 (the plaintiff's attorney, who was suffering from pancreatic cancer, was too ill to prepare the case properly, and the plaintiff was due to have spinal surgery; under these circumstances, the trial court abused its discretion as a matter of law in failing to grant a continuance).

Furthermore, under Code of Civil Procedure § 437c(i)⁴, where a continuance is granted for further discovery, and then the moving party unreasonably interferes with the discovery, the trial court *shall* either grant another continuance or deny the summary judgment motion. White does not contend that the moving party (Azure) directly interfered with his ability to get the authenticating declaration. It was Primo that agreed that its expert would testify at the trial (presumably supporting plaintiff's case with his opinion) and that he

⁴ Code Civ. Proc. § 437c(i) provides:

If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of any party to compel discovery under the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4).

would sign a declaration authenticating his accident report. But at the last minute, Primo reneged. Azure was granted summary judgment on the ground that there was no material fact in dispute, and White never got to trial. Thus, neither Azure nor the former defendant Primo was required to produce the incriminating report *that everyone knows exists*.

The trial court had acted fairly, appropriately, and even-handedly in granting White a first continuance to obtain an authenticating declaration. Then, after acknowledging that White's counsel had been "sandbagged," the court metaphorically threw up its hands and granted the motion, stating that, "under the law I have no choice." But the court was wrong.

It had other choices. It could have continued the motion again to allow White to depose the Primo expert and thus acquire admissible evidence to support his opposition. In some cases, granting multiple continuances and even delaying trial is appropriate. *Hernandez, supra*, 115 Cal.App.4th at 1247. Or, it could have denied the motion and allowed the trial to proceed. What it should not have done is grant a case-dispositive motion on the ground that there was no disputed issue of material fact, when the court and all parties knew that was not true.

Terminating sanctions have been held to be an abuse of discretion unless the party's violation of the procedural rule was willful. . . . The sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice.

Security Pacific National Bank v. Bradley (1992) 4 Cal.App.4th 89, 98 (trial court abused its discretion in granting defendant's motion for summary judgment solely because the plaintiff failed to file a separate responsive statement).

The trial court abused its discretion in granting summary judgment here.

CONCLUSION

Section 437c(h) virtually mandates that the court deny a summary judgment motion or grant a continuance when the opposing party establishes by declaration that specific facts essential to justify opposition exist, but cannot then be presented, and explains the reason why. White produced a declaration sufficient to satisfy those requirements. Therefore, the trial court's order granting the motion for summary judgment should be vacated, as well as the judgment entered thereon, and the matter should be remanded for further proceedings.

Date: July ____, 2__

Respectfully submitted,

Attorney for Plaintiff/Appellant
GEORGE WHITE

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APPELLANT'S REPLY BRIEF

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INTRODUCTION

Everyone knew that a crucial issue of material fact existed, yet the court granted summary judgment anyway.

Respondent Azure Primo Auto Dealership argued that there was no issue of material fact as to whether it could be liable for negligence in improperly repairing—six times—the transmission in appellant George White’s truck before it broke down and caught fire. Its summary judgment motion was based on a report in which respondent Azure Primo’s expert accident investigator concluded that the fire arose in the wire harness, and Azure had never worked on that part. In opposition, White produced a contradictory report. The expert accident investigator for former defendant Primo Car Corporation (which had been dismissed from the case) stated that the fire was caused by transmission fluid dripping onto hot pipes. Plaintiff’s counsel had been unable to obtain an authenticating declaration for that report, despite assurances by Primo’s counsel that it would be provided. In short, he was sandbagged.

White contends that, in such a situation, the court *must* deny the motion or grant a continuance to allow more time for the opposing party to obtain affidavits or conduct discovery.

ARGUMENT

1. On a showing that facts essential to opposing summary judgment exist, but cannot yet be presented, the court must either deny the motion, grant a continuance, or make “any other order as may be just.” It may not simply ignore the dispute and grant summary judgment.

A. The court should have denied the summary judgment motion outright.

Throughout its brief, Azure single-mindedly focuses on a second continuance as White’s only possible avenue for relief. But Azure ignores the express language of Code of Civil Procedure § 437c subdivision (h):

If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

On receipt of an affidavit making the required showing (discussed *infra*), § 437c(h) identifies three courses of action, one of which the court “shall” follow. The first option is that “the court shall deny the motion.” *Ibid.* Azure scoffs that White seems to be really arguing that the court should have denied the summary judgment motion in its entirety. RB 17:4-5. That is precisely what White is arguing because *that is what the statute directs*. Moreover, § 437c(h) does not limit the court’s prerogative to deny the motion. It requires only “a showing that facts essential to opposing summary judgment exist, but cannot yet be presented.” *Ibid.*

Here, the court knew that evidence essential to opposing summary

judgment existed and was highly credible. Primo's expert's report directly contradicted Azure's expert on the cause of the fire. AA 26:1-7; 33. Since the summary judgment motion had been trailed until the eve of trial (AOB 5:5-8), its outright denial would have been entirely appropriate.

People v. \$4,503 United States Currency (1996) 49 Cal.App.4th 1743, involved forfeiture proceedings under Health & Safety Code § 11470. The defendant moved for summary judgment on the ground that the People could not rely on an out-of-state indictment as the underlying predicate offense. Because the defendant's failure to cooperate with discovery deprived the state of an opportunity to prove its case, the trial court properly denied the motion for summary judgment under § 437c(h). *Id.* at 1747-1748.

This case presents the flip side of that situation: a former defendant's failure to cooperate deprived plaintiff of the opportunity to present his evidence in opposition to the summary judgment motion. By analogy, the lower court should properly have denied that motion.

B. Alternatively, the court could have granted a second continuance.

Even if the court chose not to deny the motion, it could have ordered the matter continued again. In some circumstances, multiple continuances are appropriate. *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1245-1246.

C. Finally, the court could have fashioned some other appropriate order.

The court had a third statutory option to "make any other order as may be just." § 437c(h). For example, the court could have extended the discovery period

to enable counsel to depose Mr. Smith and permitted White to file a supplemental brief producing the deposition testimony before making a final ruling on the motion. This may also have been a case where the trial date should have been continued. In *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, the court noted the harsh and drastic nature of summary judgment, and stated that it is preferable to continue the trial date to permit the matter to be heard on the merits, even if minimal diligence has been shown.⁵

[T]he parties have provided no indication that there was a special reason to protect the trial date. Even were plaintiff's counsel wanting in diligence, where, as here, counsel makes some showing of excusable neglect, the policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.

Id. at 399-400.

In this case, plaintiff's counsel explained why he was unable to obtain an authenticating declaration before the hearing (see *infra*), and there was no particular reason why the trial could not have been re-scheduled.

In sum, § 437c(h) authorized the court to deny the motion, grant a continuance, or make some other appropriate order. Any of these would have been reasonable here. It may have been most appropriate for the court to deny the motion and let the matter go to trial where Mr. Smith would have testified and the matter could have been resolved on the merits. But in simply granting the motion in the face of this opposing evidence, the court chose to ignore the statute's plain language.

⁵ The court noted, "The issue of discovery diligence is not mentioned in section 437c, subdivision (h), which raises obvious doubts about its relevance." *Bahl*, at 398.

2. White’s attorney submitted two declarations making the showing necessary to trigger the Code’s requirements.

The requirements of § 437c(h) come into play when the opposing party presents an affidavit or declaration “showing that facts essential to opposing summary judgment exist, but cannot yet be presented.” *Ibid.* Plaintiff’s counsel presented not one, but two, declarations making that showing first in opposition to the summary judgment motion, and again in an *ex parte* motion, as authorized by § 437c(h). Counsel explained how he had acquired the report by Primo’s expert John Smith and why he had been previously unable to obtain an authenticating declaration. AOB p. 4. The *ex parte* declaration noted that counsel had made the requisite showing, but inadvertently had not made an explicit request for a continuance. To show why additional time was needed, he presented an email from Primo’s counsel stating that Mr. Smith was then willing to sign a declaration, and suggesting that White’s counsel prepare it. These declarations were sufficient to trigger the mandatory provisions of § 437c(h).

3. Because Primo failed to produce the promised authenticating declaration, the court should have denied the motion or granted another continuance.

Code of Civil Procedure § 437c subdivision (i)⁶ deals with the situation where the court grants a continuance for the opposing party to conduct discovery,

⁶ If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication.

and the moving party unreasonably fails to allow that discovery to be conducted. In that situation, the court “*shall*” deny the motion or grant another continuance.

Here, the court granted a continuance so that White’s counsel could obtain the authenticating declaration that Primo’s attorney had promised. But at the last minute Primo reneged. It can be fairly inferred that neither Azure nor Primo wanted Mr. Smith’s accident-investigation report introduced into evidence, either in opposition to the motion or at trial. The report clearly concluded that the fire was caused by a faulty condition in precisely the part that Primo’s dealer had worked on and failed to properly repair six times in the two months before the fire.

The court knew exactly what was going on: “You were sandbagged.” RT 1:2. It saw that defendants’ sharp practice had interfered with the express purpose of the continuance. Defendants smothered the crucial evidence that would have doomed Azure’s summary judgment motion. Yet the court failed to recognize that this situation fit the intent—if not the exact letter—of § 437c(i), dictating that the court either deny the motion or grant another continuance.

CONCLUSION

The court, the parties, and their counsel all had actual knowledge that there was a real dispute, and credible evidence supporting George White’s claim. White made the required showing that he had an expert accident-investigator’s report contradicting every ground on which Azure’s summary judgment motion was based, and he showed why he had been unable to produce it at the scheduled hearing. That evidence should have been presented to a jury to decide which expert was more credible.

The trial court abused its discretion in ignoring the dictates of the statute and granting summary judgment. And when Primo’s obstructive conduct frustrated the purpose of the continuance, the lower court erred in failing to deny

the motion or grant another continuance under Code of Civil Procedure § 437c(i).

White respectfully requests that the decision of the lower court be reversed, the dismissal be vacated, and the case be remanded for trial.

Dated:

Respectfully submitted,

Attorney for Plaintiff/Appellant
GEORGE WHITE