ALAN LEE PAVEY, Plaintiff and Respondent, v. FARMERS INSURANCE EXCHANGE et al., Defendants and Appellants.

D050922

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2008 Cal. App. Unpub. LEXIS 5884

July 22, 2008, Filed

PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of San Diego County, No. GIC861218. Jay M. Bloom, Judge.

DISPOSITION: Reversed.

JUDGES: O'ROURKE, J.; NARES, Acting P. J., IRION, J. concurred.

OPINION BY: O'ROURKE

OPINION

Alan Lee Pavey sued Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company (Farmers) for breach of contract. The jury found in Pavey's favor. Farmers appeals, contending the trial court erred by: (1) failing to instruct the jury regarding anticipatory breach; and (2) excluding business records evidence that was properly admissible under Evidence Code section 1271. Because we conclude that the trial court erred in failing to properly instruct the jury, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

In 1976, Alan Lee Pavey started working as an insurance agent for Farmers Insurance. In 1984, he signed an agent appointment agreement (agreement), which stated that the agreement could be terminated if he made a "willful misrepresentation that is material to [Farmers]."

On August 17, 2005, Farmers sent Pavey a letter terminating the agreement based on Pavey's willful misrepresentation. Specifically, Pavey changed the mileage codes [*2] on automobile policies without verifying with the policyholders the actual mileage driven for each insured vehicle.

Under the agreement, Farmers was required to pay Pavey "contract value" because the termination was not based on embezzlement. Paragraph G of the agreement stated, "[c]ontract [v]alue is based upon (1) the amount of service commissions paid to the [a]gent on active policies during either the six month or twelve month period immediately preceding termination; (2) the number of policies in the [a]gent's active code number; (3) the number of years of continuous service as an [a]gent for the [c]ompanies immediately prior to termination." Farmers calculated that Pavey's contract value was $ 142,739.95, and payable in three installments.

Pavey filed a first amended complaint, the operative pleading, for breach of contract and declaratory relief, alleging that Farmers failed to pay him the contract value, a bonus and other commissions. Farmers moved for summary judgment. The trial court denied the motion as to the breach of contract cause of action, but granted it as to the declaratory relief action. [1] The breach of contract action proceeded to trial by jury.

1 The trial court [*3] ruled, "There is also conflicting evidence whether the [c]ontract [v]alue was tendered to [Pavey]. Moreover, the [agreement] does not expressly condition payment of [c]ontract [v]alue on [Pavey's] turning over files and lease interests, nor does [Pavey's] solicitation relieve [Farmers] of their obligation to pay [c]ontract [v]alue. Thus there are triable issues whether both sides performed their obligations under the [agreement] and whether [Pavey] and/or [Farmers] breached the [agreement]."

Stephen Brown, Farmers' division marketing manager, testified that on August 19, 2005, he had a meeting at Pavey's office to terminate Pavey. Brown was accompanied by two Farmers employees, Michael Pugsley, a district manager, and Adrian Gammal. Brown testified he "tender[ed] . . . to [Pavey]" an envelope containing the termination letter and a check for the contract value's first installment. Brown told Pavey the agreement required him to return to Farmers all rights to the leased or rented office location, plus telephone numbers, policyholder files, manuals and other documents belonging to Farmers. [2] Pavey refused and said his father and wife would solicit Farmers' book of business. Brown left [*4] the meeting without paying Pavey the contract value at that time or at any time before trial. Brown testified that Pavey broke the agreement by soliciting Farmers' clients as demonstrated by Pavey's answering machine message, a sign on Pavey's office door and a letter Pavey sent to his former clients.

2 Paragraph H of the agreement states:

"[Pavey] agrees to transfer and assign all of [Pavey's] interest under this [a]greement and [a]gency (including, at the request of [Farmers], any interest in the telephone numbers and leased or rented office location) to [Farmers] at the time of payment or tender of payment to [Pavey] pursuant to Paragraph G of this [a]greement. [Pavey] agrees to accept tender of [c]ontract [v]alue and further agrees that for a period of one year following the date of payment or tender of payment [Pavey] will neither directly or indirectly solicit, accept, or service the insurance business of any policyholder of record in the agencies of this district as of the date of payment or tender of payment."

Paragraph I of the agreement states:

"[Pavey] acknowledges that all manuals, lists and records of any kind (including information pertaining to policyholders and expirations) [*5] are the confidential property of [Farmers], and agrees they shall not be used or divulged in any way detrimental to [Farmers], and shall be returned to [Farmers], upon termination of the [a]gency."

Pugsley testified that at the August 19, 2005 meeting, Brown handed the check to Pavey, but Brown took it back. Pavey refused Brown's request for the office phones, lease, client files and phone numbers. Pavey was hostile to them throughout the meeting, and told them to leave. Gammal testified he made notes regarding the meeting with Pavey and summarized Pavey's arguments during the meeting as follows: "A number of themes came out. Number one, we did not have a right to be in that office and terminate [Pavey's] contract. Number two, even if we did, his wife and father would certainly get those accounts back. Number three, we could not get the phone number nor the location because those were not in his name. Number four, that he would contact his lawyer. Number five, we were to leave the office."

On August 19, 2005, Brown sent Pavey a letter summarizing the meeting and stating, "As you refused to comply with Section H and my request to transfer and assign your interest in all of your telephone [*6] numbers and your leased or rented office location, all of your policy-holder files and records and any and all [c]ompany manuals and equipment, I am again requesting that you comply with Section H and all my requests mentioned above. Please contact me as soon as practical [*sic*] so that I can arrange a time with you to obtain all of the aforementioned items and to again tender and provide you with your first installment of contract value."

On August 24, 2005, Pavey sent Charles Dabelgott, a Farmers market manager, an email stating, "[I]m still waiting for my contract check and someone to pick up files. . . . [I]'ve had over 80 phone calls from customers wanting service on their accounts." Dabelgott instructed Brown to "call Mr. Pavey to arrange the tender of his [contract value] as he is now willing to release his phone number and other items you requested per his . . . agreement." Brown testified that no Farmers representative went to pick up the files from Pavey after he sent this email.

On August 24, 2005, Pavey sent Brown a letter stating, "It seems you misunderstood our conversation again. I had corrected my initial statement as I was slightly upset. I had restated I would comply [*7] item H [*sic*]. I will comply with item H of my contract concerning solicitation of my clients as applies to California law." The letter also stated that Pavey had no legal interest in the office, equipment, phone lines, and rather he paid rent and phone fees to his father, Robert Pavey. Brown testified he received copies of the lease and phone bills that were in Robert Pavey's name.

On August 26, 2005, Pavey sent Pugsley an email stating, "I expect someone to pick-up [*sic*] files and tender my check today by 2:00 pm per contract."

On August 26, 2005, Brown sent Pavey a letter stating, "Your correspondence says that you are willing to comply with Section H of your . . . [a]greement. However, it appears that you continue to wish to place limitations on your compliance. Specifically you make reference to 'as applies to California law'. . . . I explained to you that the language contained within Section H is a one year non-solicitation period and that I advised you not to violate that provision of your contract. I again restate that you should immediately cease and desist any attempts or plans to either directly or indirectly solicit, accept, or service the insurance business of any policy-holder [*8] of record in the agencies of District 99-16. [P] . . . Your assertion that the lease and telephone numbers are in your fathers [*sic*] name and that he is an independent agent does not change the intent of the . . . [a]greement that you signed and does not alter your signed agreement to comply with your contractual obligations under that . . . [a]greement." Brown ended the letter stating, "At this time I am hereby again tendering contract value to you and requesting that you comply with the above request and immediately provide to your [d]istrict [m]anager all manuals, lists, policy holder records of any kind (on or off site), including any databases on any computer system that hold any policy-holder information or expirations, and to complete the transfers of your office lease, telephone and fax

numbers. I look forward to you contacting your [d]istrict [m]anager, or myself, to comply with the above Section H of your . . . [a]greement. We will deliver your first installment of your [c]ontract [v]alue at such time that you comply with the above requests."

Pavey, in an August 26, 2005 email to Brown, wrote, "I will restate this. I will comply section [*sic*] H of my contract and the 1 yr [*9] non-compete clause!! [*sic*]" Pavey added, "I expect someone at my office 10 am tomorrow. . . . with check and to pick-up [*sic*] files and all the payments sent to my office."

Pavey testified as follows regarding the August 19, 2005 meeting with Brown: "Our initial discussion basically concerning the phone and the lease -- and I told him that while I couldn't give him the phone and the lease because they were in my father's name, my father wasn't even in the office, and I had no way of turning these over to him legally. I couldn't call AT&T, have something turned over that's not in my name. They wouldn't talk to me. And I sure couldn't have turned over, signed to Farmers when my name is not on the lease. And from there, he basically he was not going to give me my contract check."

Pavey testified that in early September, 2005, he made a sign in capital letters stating, "Will open hopefully next week with competitive service." He posted it on his office's front door. He sent a letter to his "clients and friends," informing them that his father and wife would launch a new business in the same office Pavey would continue to occupy, and they would offer "VERY competitive options to fulfill all [*10] insurance needs." [3] Pavey changed his telephone answering machine message to include the same general information stated in this letter.

3 Pavey's letter to his "clients and friends" stated in its substantive entirety:

"After almost thirty years representing Farmers Insurance it became necessary for us to part ways. As of August 19, I am no longer associated with Farmers. However, due to a one-year contractual obligation (being reviewed by my attorney) I am restricted from soliciting business from any clients I had with Farmers till 8-19-06. [P] Robert Pavey Insurance Agency will be opening for business within the next couple of weeks. His office will continue at the same location that I have been at on Rosecrans along with the same phone numbers. Robert Pavey Insurance will offer a variety of VERY competitive options to fulfill all insurance needs. Working in the office with Bob will be Kathy Pavey. I will be in the office operating my newly restructured insurance business. [P] I am sorry for any inconvenience this may have caused you and have truly enjoyed our business relationship. Any questions regarding your Farmers Insurance policies should be directed to Farmers at [phone number [*11] omitted]. I assume Farmers will assign you a new agent in the next few months."

Farmers requested the jury be instructed with CACI No. 324, [4] regarding anticipatory breach, in a "bench brief re[garding] Plaintiff's material breach of contract which relieves defendant's duty to pay contract value." Farmers argued that Pavey, upon his termination, had clearly and unconditionally manifested he would not comply with the agreement's non-solicitation provision; would not deliver Farmers' documents, records, confidential business information, the rights to the office lease and telephone.

4 The proposed instruction with CACI No. 324 stated:

"A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that he or she will not or cannot meet the requirements of the contract.

"If Farmers proves it would have been able to fulfill the terms of the contract and that Alan Pavey clearly and positively indicated, by words or conduct, that Alan Pavey would not or could not meet the contract requirements, then Alan Pavey breached the contract."

The trial court refused to instruct with CACI No. 324, stating, "I don't feel that it's applicable [*12] here. . . . I think the argument is CACI No. 303 [5] . . . whether [Pavey] met all the conditions -- I think that's what you're arguing . . . I don't think it's an anticipatory breach case." The parties agreed to the special verdict form, but the trial court, consistent with its decision to deny instruction regarding anticipatory breach, deleted a question regarding anticipatory breach from the special verdict form. [6]

5 The trial court instructed -- based on the language of CACI No. 303 -- as follows:

"Alan Pavey claims he and Farmers entered into a contract under which he was appointed as an insurance agent for Farmers. Alan Pavey claims Farmers breached the contract by failing to pay him contract value. Alan Pavey also claimed Farmers' failure to pay contract value caused him harm in the amount of the contract value plus interest from the time such payments were due. Farmers denies it breached the contract.

"Farmers also claims, one, Alan Pavey has waived his right to recover any amount from any of the defendants because of his own conduct. Two, Defendants are entitled to a total or partial setoff against the amount, if any, Alan Pavey recovers against Defendants.

"To recover damages [*13] from Farmers for breach of contract, Alan Pavey must prove all of the following: One, that Alan Pavey and Farmers entered into a contract. Two, that Alan Pavey did all or substantially all of the significant things that the contract required him to do or that he was excused from doing those things. Three, that all . . . conditions required by the contract for Farmers' performance had occurred. Four, that Farmers failed to do something that the contract required them to do. And, five, that Alan Pavey was harmed by that failure. The parties agree that a contract was entered into in this case.

"You are to determine if any of the provisions set forth in Paragraphs H and/or I of the agent appointment agreement are things the plaintiff was required to do to receive payment of contract value. This is a factual question for you to determine based on a reading of the contract and all of the evidence presented by both sides.

"Farmers contends that Alan Pavey did not perform all of the things that he was required to do under the contract and therefore Farmers did not have to perform their obligations under the contract. To overcome this contention Alan Pavey must prove both of the following: [*14] that Alan Pavey made a good faith effort to comply with the contract; and that Farmers received essentially what the contract called for because Alan Pavey's failures, if any, are so trivial or unimportant that they could have been easily fixed."

6 The revised special verdict form stated:

"Question 1: Did Plaintiff do all, or substantially all, of the significant things his contract with Defendants required him to do?

" Yes No

"Question 2: Was Plaintiff excused from doing all, or substantially all, of the significant things that the contract required him to do?

" Yes No

"Question 3: Did all of the conditions occur that were required for the Defendant's performance?

" Yes No

"Question 4: Did the Defendants fail to do something that the contract required them to do?

" Yes No

Question 5: Ws Plaintiff harmed by that failure?

" Yes No

"Question 6: Did Plaintiff waive his right to any recovery from Defendants?

Yes No

[P] ... [P]

"Question 7: What are Plaintiff's damages?

" Yes No

"Question 8: Are Defendants entitled to any setoff against Plaintiff's damages?

" Yes No

[P] ... [P]

"Question 9: What is the amount of Defendants' setoff?"

The jury returned [*15] a special verdict awarding Pavey $ 157,639.66. Farmers moved for a new trial, alleging the court erred in: (1) failing to instruct regarding anticipatory breach; (2) admitting evidence of Pavey's earnings during the year following his termination, and testimony regarding a $ 100,000 loan he took out to support his family; and (3) refusing to admit computer generated documents regarding the amount of setoff Pavey owed Farmers. Following a hearing, the trial court denied the motion.

DISCUSSION

I.

Farmers contends the trial court "committed substantial prejudicial error" by failing to give CACI No. 324. Our analysis is guided by the following principles: "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented." (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607.)

Instructional [*16] error in a civil case is not ground for reversal unless it is probable the error prejudicially affected the verdict. "This determination depends heavily on the particular nature of the error, and its effect on the appellant's ability to place his or her full case before the jury." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) "Actual prejudice must be assessed in the context of the individual trial record." (*Soule,* at p. 580; *Steiny & Co., Inc. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 295.) The reviewing court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, (4) any indications by the jury itself that it was misled, and (5) the closeness of the verdict. (*Soule,* at pp. 570-571; 580-581.)

California law regarding anticipatory breach states that a contract may be breached by nonperformance, repudiation, or a combination of the two. [7] (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 849, pp. 936-937.) A repudiation of the contract may be express or implied. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (*Taylor*).)

> 7 By "breach by nonperformance" we refer [*17] to an unjustified failure to perform a material contractual obligation when performance is due. (See Rest.2d Contracts, § 251, subd. (1), p. 276.)

"A repudiation may have several consequences. When a repudiation occurs before any breach by nonperformance, there are three main consequences. [Citations.] First, the repudiation 'may give rise to a claim for damages for total breach. . . .' [Citations.] Second, it may discharge the other party's duties to render performance. [Citation.] Third, it may excuse the nonoccurrence of a condition to a duty of the repudiating party. [Citation.] [P] Breach by repudiation is referred to in the case law as an 'anticipatory breach.' [Citation.] As a matter of definition, an anticipatory breach of contract occurs when the contract is repudiated by the promisor before the promisor's performance under the contract is due." (*Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 514, fns. omitted.)

"When a promisor repudiates a contract, the injured party faces an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between [*18] the parties, or he can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time. [Citation.] However, if the injured party disregards the repudiation and treats the contract as still in force, and the repudiation is retracted prior to the time of performance, then the repudiation is nullified and the injured party is left with his remedies, if any, invocable at the time of performance." (*Taylor, supra,* 15 Cal.3d at pp. 137-138.)

Here, the trial court erred in refusing to instruct with CACI No. 324. Farmers presented substantial evidence to support its defense on the issue of anticipatory breach. Specifically, the agreement required Pavey to transfer to Farmers any interest in the files, telephone numbers and leased or rented office location at the time of payment or tender of payment to Pavey, and not to solicit clients. At the August 19, 2005 meeting, Pavey refused to turn over to Brown the required materials. Despite Pavey's stated commitment -- in correspondence with Brown and other Farmers officials -- to turn over the files, he never did so. Separately, sufficient [*19] evidence was presented for the jury reasonably to find that Pavey engaged in solicitation. Pavey's letter to his clients regarding his departure from Farmers stated Pavey's family would offer service competitive to that offered by

Farmers. This same message was reinforced in Pavey's changed answering machine message and the sign on his office door.

Applying the five *Soule* factors, we conclude that in light of the whole record, the instructional error was prejudicial. First, if properly instructed, the jury would have had the opportunity to find that Pavey's failure to fulfill the terms of the agreement excused Farmers of the duty to perform its obligations under the agreement. Sufficient evidence would have supported such a finding, but this jury was precluded from reaching that finding.

Second, the trial court's instruction with CACI No. 303 did not cure the defect in failing to instruct regarding anticipatory breach. CACI No. 303 did not inform the jury that Pavey's repudiation of the agreement was a breach based on Farmers' presentation of sufficient evidence that at the August 19, 2005 meeting, Farmers was ready and willing to perform under the agreement.

Third, counsel, in closing [*20] arguments, alluded in general terms to the issues raised by the anticipatory breach defense. However, the court's refusal to instruct directly on the subject prejudicially limited Farmers' ability to forthrightly address this defense that was central to Farmers' case.

Fourth, the jury's answer to special verdict question 1 evidenced jury confusion regarding Pavey's failure to comply with the agreement. [8] The jury found that Pavey did not do "all, or substantially all, of the significant things his contract with [Farmers] required him to do." However, the trial court's decision to order removal of the question regarding anticipatory breach from the special verdict form prevented the jury from finding that a consequence of Pavey's breach of the agreement was that Farmers' nonperformance was excused.

> 8 On a matter unrelated to the issues on appeal, the jury, during its deliberations, sent the court a note stating, "We need Question 3 either reworded or clarified. We are not comprehending it." Based on the parties' agreement, the court responded as follows: "Under the facts of this case, this question refers to whether Plaintiff was terminated. The parties do not dispute the fact that this [*21] event did occur."

Finally, the closeness of the jury's special verdict strongly supports our conclusion that it is reasonably probable Farmers would have received a more favorable verdict had the CACI No. 324 instruction been given. Special verdict question no. 8 asked, "Are defendants entitled to any setoff against plaintiff's damages?" This question raised the possibility that Farmers was entitled to some relief because of Pavey's breach, and therefore implicated the anticipatory breach defense. By a vote of nine to three, the jurors answered "no" to this question. That vote was the bare minimum allowed for a verdict on that question. In *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, the court stated: "Even if only one of the nine jurors who supported the verdict voted on this basis, the effect was prejudicial. Here, as in *Robinson v. Cable* [(1961) 55 Cal.2d 425, 428], '[the] fact that only the bare number of jurors required to reach a verdict agreed upon the verdict for defendants lends further support to the probability that the erroneous instruction was the factor [that] tipped the scales in defendants' favor.' " (*Id.* at p. 877; see also *Logacz v. Limansky* [*22] (1999**)** 71 Cal.App.4th 1149, 1166 [nine-to-three special verdict supported court's conclusion that erroneous omission of instruction was prejudicial].)

Based on our conclusion the instructional error was prejudicial, we need not address the other issues Pavey raises on appeal. [9]

9 Specifically, Pavey contends in his opening brief: (1) "There is no consideration for the post-termination obligations of paragraphs H and I, and therefore there could be no breach of said paragraphs." (2) "There can be no breach of contract action for failure to perform paragraph I according to its express terms." (3) "There was no consideration for the option for the assignment of any real property lease and telephone number as set forth in the first sentence of paragraph H." (4) "The nonsolicitation [agreement] is unenforceable because it is unconscionable." (5) "The contract itself does not lend itself to an interpretation that contract value, in whole or in part, can be consideration for the post-termination obligations of paragraphs H and I."

II.

Farmers contends the trial court erred in excluding from evidence a report which Farmers proffered "[i]n an effort to establish the amount of setoff to which [*23] [Farmers was] entitled, they submitted a computer generated report called an in force/out of force report which showed there was an extraordinarily high percentage of attrition by [Farmers'] policyholders in the year following [Pavey's] termination."

Evidence Code section 1271 permits the admission of records which would otherwise be inadmissible by the hearsay rule, if four conditions are met: "(a) The writing was made in the regular course of a business; [P] (b) The writing was made at or near the time of the act, condition, or event; [P] (c) The custodian or other qualified witness testifies to its identity and the mode of preparation; and [P] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

" 'Whether a particular business record is admissible as an exception to the hearsay rule in a criminal trial depends upon the "trustworthiness" of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record.' " (*People v. Matthews* (1991) 229 Cal.App.3d 930, 939.) "The foundation for admitting the record is properly laid if in the opinion of the court, the sources of [*24] information, method and time of preparation were such as to justify its admission." (*People v. Williams* (1973) 36 Cal.App.3d 262, 275.)

" 'While it is true that the trial court has broad discretion in admitting business records' . . . the express language of the statute, make[s] it clear that there must be some evidence showing that the basic minimal requirements -- identifying the records, the mode of their preparation and showing that they were prepared in the regular course of business -- have been met." (*Gee v. Timineri* (1967) 248 Cal.App.2d 139, 147-148 (*Gee*).)

During the trial testimony of Sohi Inder, a program manger in Farmers' management information systems department, Farmers sought to introduce into evidence a report she prepared one week before trial. It purported to show Pavey's auto policies, fire policies and commercial policies that were active in August 2005 and those that were inactive as of August 2006. Pavey objected that the report contained multiple hearsay, and it was prepared in the course of litigation. Farmers' counsel partially conceded, "I think it was generated for this, but it's actual data that was pulled. It's kept as a normal business record. And the [*25] majority of that data was entered by Mr. Pavey when he entered policyholder information." [10]

10 Pavey's counsel also stated, "I do believe, your honor, I thought I heard testimony previously that this document is not usually produced - generated within Farmers." Farmers' coun-

sel responded, "It's not normally produced, but it's produced from the same database that they use to produce information to the State, so it's reliable."

The trial court sustained the objection, ruling, "[W]hile what Mr. Pavey may have entered may have been admissions by him, what we have now is a record of that, which is another level of hearsay, and it has to comply with Evidence Code 1271, which is business records. And one requirement is the writing was made in the regular course of business . . . was made at or near the time of the condition or event. A custodian or other qualified witness testifies to its identity and mode and time of preparation were such to [*sic*] indicate its trustworthiness. [P] So there's questions about all of those, but particularly, A, it's not made in the regular course of business if it was prepared last week with a trial call on Friday. It's not regular course of business."

We conclude [*26] that the trial court's ruling was correct because the foundational requirements of Evidence Code section 1271 were not satisfied. As the *Gee* court stated, one witness "testified that the record was not prepared in the 'normal course' of his business but in anticipation of the lawsuit with defendant. The statement introduced and plaintiff's testimony based on it, were, therefore, inadmissible hearsay." (*Gee, supra,* Cal.App.2d at p. 148.)

DISPOSITION

The judgment is reversed. Farmers is awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.