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Supreme Court of California
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Case No. S259522

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

RAUL BERROTERAN II,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY
Real Party in Interest

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE, CASE NO. B296639; LOS ANGLES COUNTY SUPERIOR COURT, CASE NO. BC542525, THE HONORABLE GREGORY KEOSIAN, JUDGE.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF REAL PARTY IN INTEREST

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC") welcomes the opportunity to address as *amicus curiae*[1] the issue this case presents:

> **Is deposition testimony from a friendly witness to a party in a case that settled before trial admissible, under Evidence Code section 1291, in a later and different trial against that party involving a similar issue?**

The answer to this question is important because section 1291 conditions the admissibility of prior deposition testimony from a different case on the party, here the

[1] By separate accompanying application, amicus asks the Court to accept this brief for filing.

defendant/real party in interest, having had a similar "interest and motive" to cross-examine its own friendly or "aligned" witness in both cases. If the "interest and motive" for cross-examination of that witness is not similar in both cases, then the deposition testimony is excluded as *inadmissible hearsay*. Conversely, if the "interest and motive" for cross-examination is similar in both cases, the deposition testimony is admissible as a statutory exception to the hearsay rule.

Here, the appellate court disagreed with the trial court's ruling that the prior deposition testimony should be excluded because the "motive and interest" of the defendant to cross-examine the witnesses in both cases was not sufficiently similar. In doing so, the appellate court expressly disagreed with *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, 547 ("*Wahlgren*"), which holds that "[g]iven the practical differences between each of the proceedings [*i.e.*, deposition testimony in the first case that settled and trial testimony in the second]. . . the trial court acted properly in excluding the deposition testimony" from the earlier case.

How the Court resolves this split in appellate authority will determine whether section 1291 serves to promote the search for truth or hinders it. While there are situations in which a severing of procedural restraints might serve the

interests of truth, experience suggests that the gain would be transitory and ultimately destructive. After all, "truth and the methods used to find it are not distinct and separable, as Madison knew before Heisenberg." Paul N. Halvonik, *Exclusionary Rules: An Introduction* (1982) 33 *Hast. L. J.* 1057.

CJAC is a longstanding nonprofit organization of businesses, professional associations and financial institutions. Our principal purpose is to promote fairness, economy, and certainty in the scope and application of civil liability laws, including rules of evidence that determine what evidentiary facts are admissible to inform and construe substantive law. Sometimes these goals conflict; "fairness, for example, clashes with "economy" when it comes to admissibility of deposition testimony in the trial of a current case from a former case that was never tried because it settled. When that occurs, CJAC gives primary weight to "fairness" to the parties in litigation, the closest concept to "justice," the ultimate aim of courts. Toward these ends, CJAC files friend of the court briefs in select cases involving who pays, how much, and to whom when the conduct of some is alleged to occasion harm to others. Our participation in these cases understandably assumes that "the purpose of all rules of evidence is to aid in arriving at the truth" (*People v.*

Spriggs (1964) 60 Cal.2d 868, 875), the guiding principle underscoring our analysis of section 1291 here.

THE PROCEEDINGS BELOW[2]

A. The Trial Court Proceedings

Ford Motor Co. ("Ford") is the common defendant in the previous case[s] as well as this one. The first case was a federal multi-district court class action filed in Illinois in 2010 alleging defects in Ford's 6.0-liter diesel engine. Causes of action in that lawsuit[3] included breach of implied and express warranty and violation of various state consumer protection laws.

Before certification of that class action, plaintiff's counsel deposed five Ford employees and former employees in Michigan and Florida "about the evolving design of the engine as used in various vehicles." Petition, p. 14. Ford's class action counsel did not pose any questions to those witnesses. *Id.* That case settled in 2012 or 2013 with the parties stipulating to class certification.

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[2] This summary is extrapolated from the appellate opinion and briefs of the parties, and is provided because factual context helps inform and determine the legal issues.

[3] *In re Navistar Diesel Engine Products Liability Litigation* (N.D. Ill. July 3, 2013, Case No. 11C2496 [MDL No. 2223]) 2013 WL 10545508.

Berroteran, a putative (unnamed) class member in the above suit, opted out of the settlement and filed his own individual state court action in California against Ford in 2013. He alleged that a Ford pick-up truck with a 6.0-liter engine he purchased in 2006 and drove for seven years was defective and violated claims for common law fraud, and California's Consumer Legal Remedies Act and the Song-Beverly Consumer Warranty Act.

Berroteran informed Ford that he intended to introduce portions of the video depositions of these five former Ford employees, along with deposition testimony from four other Ford employees taken in other lawsuits against Ford. Three of those other cases, like the federal multi-district litigation, settled before trial.

Ford responded by filing a motion in limine to exclude deposition testimony from these nine witnesses on the grounds that, pursuant to Evidence Code § 1291(a)(2), it was inadmissible hearsay because it lacked any meaningful cross-examination when given because Ford's counsel had a different "interest and motive" to cross-examine its aligned witnesses in pre-trial depositions than it did at trial. This was, Ford argued, contrary to the holding and reasoning of *Wahlgren*. Ford also claimed the issues in the class action and Berroteran's individual action were not all that similar:

the class action in the federal multi-district case concerned alleged defects in all of Ford's 6.0-liter engines manufactured over a five-year period, while Berroteran's case concerned problems with a single engine manufactured in 2006. A major defense by Ford in Berroteran's lawsuit is that the 6.0-liter engine improved continuously over its five-year run, an issue not addressed in the pre-trial depositions for the federal multi-district class action. Return to Petition for Writ of Mandate ("PWM"), B296639, p. 18.

Berroteran countered that each of the challenged depositions was taken with the understanding that "the testimony would be presented at trial against Ford involving the same claim as plaintiff's claims against Ford, that Ford did examine two deponents . . . , and that the class action and other depositions [were] used as evidence in other opt-out trials." PWM, B296639, ¶51, p. 39. Plaintiff claims that granting Ford's in limine motion relegates him to resort to "pointless, entirely duplicative and *expensive* task of re-deposing each deponent in other states, asking them to confirm what they said in their prior depositions years before when their memories were fresher." Reply to Return to PWM, pp. 10-11; emphasis added.

The trial court heard the parties' arguments over a two-day period and then ruled in favor of Ford. It found that Code

of Civil Procedure § 2025.620(g) was inapplicable to the admission of pre-trial depositions from one case into another later case because, *inter alia*, the parties here were different in the two cases; a putative class action member such as Berroteran who opted out of settlement in an earlier lawsuit against Ford does not qualify as the "same party" plaintiff in a subsequent lawsuit he files against Ford.

The trial court also found that Ford had no reason under section 1291 to question aligned witnesses in the previous individual cases about problems Berroteran had with his 2006 truck. Nor did Ford have a similar "interest and motive" to examine its own witnesses at depositions in the federal multi-district lawsuit involving engines produced over a five-year period about the engine Berroteran bought in 2006. The "former litigation and the present case did not have enough overlapping subject matter, so Ford had an insufficient motive to cross-examine on the specific issues relevant to the present case." 1 C.T. 331, Exhibit 7. As the trial court found, the class actions "involve multiple issues that are not really at issue here." *Id.*

B. The Appellate Court Opinion

The appellate court reversed, stating that the trial court abused its discretion by excluding the deposition testimony

because “Ford had the right and opportunity [in the previous pre-trial depositions taken in different cases] to cross examine its employees and former employees with a similar motive and interest as it would have in [this] case.” *Berroteran v. Superior Court* (2019) 41 Cal.App.5th 518, 520. While acknowledging that *Wahlgren* “arguably support[s] Ford’s argument and the trial court’s conclusion,” the opinion “disagree[s] with *Wahlgren*’s categorical bar to admitting deposition testimony under section 1291 based on the unexamined premise that a party’s motive to examine its witnesses at deposition always differs from its motive to do so at trial.” *Id.* at 529. It faults *Wahlgren* for failing to “cite support for its assertions that a deposition functions only as a discovery device,” stating that such an “assumption is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice.” *Id.* at 533. The opinion places squarely on Ford the burden to “demonstrate that it lacked a similar motive to examine its witnesses in the former litigation,” stating that “[e]ach deponent was represented by Ford’s counsel, and Ford had the same interest to disprove allegations related to the 6.0-liter diesel engine.” *Id.* at 535.

SUMMARY OF ARGUMENT

Deposition testimony from a prior case is inadmissible against the same defendant in a later case unless that defendant had a similar interest and motive to cross-examine its own friendly witness in both. That is the command of Evidence Code section 1291 and the consistent holding of appellate opinions applying it, chiefly *Wahlgren*.

But, the opinion now before the Court for review upends *Wahlgren* and its progeny by permitting such deposition testimony to be introduced regardless of whether it was cured of its inadmissible hearsay nature by a party's cross-examination of its own witness noticed by the opposing party.

Wahlgren is correct in its application of section 1291 and the opinion here is wrong. The plain language of section 1291, its purpose, legislative history and common sense legal practice comport with *Wahlgren*, not *Berroteran*. Indeed, *Berroteran* misreads section 1291, eviscerating its legislative intent and purpose to contravene sound public policy.

The trial court here acted well within its discretion in excluding from trial prior deposition testimony by defendant's own friendly witnesses that it had tactical and strategic reasons for not subjecting to cross-examination. The burden to show the defendant had a similar "interests and motives"

in both cases and both contexts – pre-trial deposition and trial – to cross-examine its own witnesses was on plaintiff and not, as the opinion here holds, on the defendant.

Affirming *Berroteran* and its essential reversal of *Wahlgren* will have deleterious consequences for the administration of justice: a likely expanse of and expense for depositions of one's own friendly witnesses in pre-trial depositions, and a corresponding increase in appeals of trial court orders on the admissibility of piggy-backed deposition testimony from previous cases.

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED EVIDENCE CODE SECTION 1291 TO EXCLUDE FORMER PRE-TRIAL DEPOSITION TESTIMONY BY A FRIENDLY WITNESS IN A SUBSEQUENT, DIFFERENT TRIAL BECAUSE THE DEFENDANT LACKED A SIMILAR "INTEREST AND MOTIVE" TO CROSS-EXAMINE THE WITNESS IN BOTH CASES.

Wahlgren got it right and *Berroteran* got it wrong. The plain language of section 1291, its purpose, legislative history and common sense comport with *Wahlgren*'s, not *Berroteran*'s, take on the statute's scope and application.

Enacted in 1965 after several years of study by the Law Revision Commission, section 1291(a)(2) provides, in pertinent part, that evidence of former deposition testimony is

not made inadmissible in a civil action by the hearsay rule if the declarant is unavailable as a witness and:

> The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant *with an interest and motive similar to that which he has at the hearing.* (Emphasis added.)

Converting section 1291's negatively phrased proposition (i.e., "not inadmissible") into a positive one yields the following rule—hearsay testimony in a former deposition transcript by a witness aligned with a party is admissible in a later and different action involving the same party if that party had a similar "interest and motive" to cross-examine the witness in both cases.

A. The Purpose of Evidence Code Section 1291 is to Exclude Unreliable and Untrustworthy Hearsay Evidence.

Courts "ascertain the Legislature's intent in order to effectuate the law's *purpose*." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386; emphasis added. The purpose of section 1291 is to exclude hearsay testimony from an aligned witness to a party in previous pre-trial deposition from infecting a later and different case involving that same party.

Ascertaining the "similarity" of "interest and motive" for cross-examination is critical in parsing the meaning of this statutory language because deposition testimony is, absent adequate cross-examination, "hearsay." And the principal vice of hearsay – *i.e.*, "evidence of a statement made other than by a witness while testifying at the hearing . . . that is offered to prove the truth of the matter stated" (Evid. Code § 1200) – is that it lacks reliability and trustworthiness because it was not subjected to meaningful cross-examination. "Largely because, [as here], the de[ponent] is absent and *unavailable for cross-examination* . . . [in the later case], hearsay evidence is less reliable than live testimony." *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608; emphasis added.

"[T]he [hearsay] rule is designed in large part to ensure that at least a good deal of the evidence offered against a party, whether in a civil or a criminal case, is offered in person. This not only provides the person against whom the evidence is offered with a chance to face the witness in the courtroom to test the witness's memory, perception, narrative clarity and sincerity, but also provides the jury with the opportunity to judge credibility by viewing the witness at the time he or she makes the damaging statement." David P.

Leonard, *Rules of Evidence and Substantive Policy* (1992) 25 *LOY. L.A. L. REV*. 797, 810.

Hearsay evidence is often excluded to ensure that all evidence may be tested by cross-examination. *Englebretson v. Industrial Etc. Comm.* (1915) 170 Cal. 793, 798 ("The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common, knowledge, and conduct of mankind."); see 5 *WIGMORE ON EVIDENCE* (3d ed. 1940) § 1362. Indeed, the importance of cross-examination to cure the unreliability of hearsay cannot be gainsaid. As Wigmore emphasized in his first treatise, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." John Henry Wigmore, 2 *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1367 at 1697 (1904).

B. The Plain Meaning of Evidence Code Section 1291 is that Deposition Testimony from a Prior Case is Inadmissible in a Later Case unless, which is not the Situation here, the Defendant in both had a Similar Interest and Motive to Cross-Examine the Witness.

In reading statutory language to discern its plain meaning, "the ordinary rules of grammar must be applied . . . unless they lead to an absurd result." *Busching v. Superior Court* (1974) 12 Cal.3d 44, 51. Here, the appellate opinion

ignores the rules of grammar in order to reach an absurd result. It focuses on a sliver of the first prepositional phrase in subsection (a)(2) of section 1291 – "had the right and opportunity to cross-examine the declarant" – and confounds it with and downplays the second modifying prepositional phrase: *"with an interest and motive similar to that which he has at the [previous] hearing.*" (Emphasis added.) "The relevant issue . . . is whether the party had 'an opportunity and similar motive to develop the testimony," and not whether Ford "had a 'tactical or strategic' incentive to question its witnesses" at the deposition in the previous cases that it would have in this case. *Berroteran, supra*, 41 Cal.App.5th at 531.

This construction of section 1291 places upon Ford and every future defendant in an analogous position an obligation to foresee how testimony of every friendly witness to it in pre-trial deposition may be harmful in later cases involving similar issues or products, and subject that witness to extensive cross-examination. Declining for "tactical or strategic" reasons to take advantage of the opportunity to cross-examine such witnesses, forfeits any objection to future use of that testimony in a different case.

This construction is not only absurd but ignores the "last antecedent rule," which requires that "qualifying words,

phrases and clauses are to be applied to the words or phrases immediately preceding.” *People ex. rel. Lockyer v. R.J. Reynolds Co.* (2003) 107 Cal.App.4th 516, 529. In other words, the phrase in subsection (a)(2) that includes the words “had the right and opportunity to cross-examine the declarant” in the deposition of the previous case, is modified by the prepositional phrase “with an interest and motive similar to that which he has at the [trial] hearing” of this case.

Berroteran’s peculiar reading defeats the purpose of section 1291 by admitting into trial of this and future cases, deposition testimony from a previous case that lacks the critical element of meaningful cross-examination. This spin on the statute eviscerates the legislative intent and purpose of section 1291. “Such a consequence is itself sufficiently *absurd* to defeat plaintiff’s [and the appellate court’s] construction of the statute.” *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1072; emphasis added.

C. The Legislative History for Section 1291 Supports ***Wahlgren***’s Construction and Application of it; and the Legislature’s Inaction After ***Wahlgren*** and its Progeny Evinces its Approval.

Berroteran concedes that it disagrees with *Wahlgren*. *Berroteran*, *supra*, 41 Cal.App.5th at 520. But, its disagreement is sapped by essentially ignoring (except for

footnote 10) the legislative history of section 1291, history that comports with *Wahlgren*'s reading and application of the statute. That history is pertinent and should be considered if there is any ambiguity in the meaning of section 1291, including conflicting meaning created by an appellate opinion. "To discern legislative intent, we must examine the legislative history . . . of the act under scrutiny." *Long Beach Police Officer's Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 743.

The only legislative history for section 1291 is the Comment to it from the Assembly Judiciary Committee. That Comment, however, provides a specific and significant example of properly excluded deposition testimony that fits the facts of this case:

> The determination of similarity of interest and motive in cross-examination *should be based on practical considerations and not merely on the similarity of the party's position in the two cases*. For example, testimony contained in a deposition that was taken, but *not offered in evidence at the trial*, *in a different action* should be excluded if the judge determines that the deposition was taken *for discovery purposes* and that the *party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case*. In such a situation, the party's interest and motive for cross-examination on the

> previous occasion would have been substantially different from his present interest and motive.

Comment on Evid. Code § 1291, Assembly Committee on Judiciary; emphasis added.

Berroteran, as mentioned, avoids discussion of this legislative history by stating that "Ford did not proffer any evidence that there was any strategic reason for not cross-examining its witnesses at their depositions here. Absent such a record, we do not address whether this partial legislative history would dictate a different outcome upon a proper and different record." 41 Cal.App.5th at 536, fn. 10. But "[j]udges cannot pretend to be ignorant of what is within the knowledge of most [people within] . . . their jurisdictions." *Markulics v. Maico Co.* (1946) 74 Cal.App.2d 66, 69. Just as "[y]ou don't need a weather man to know which way the wind blows,"[4] neither do you need an evidentiary record to show a difference in "interest and motive" between cross-examining a friendly witness in pre-trial deposition and trial. Numerous practice guides confirm this obvious fact:

> A party's cross-examination of a witness at deposition may be *inhibited* by tactical concerns with wanting to *avoid premature revelation of weaknesses*

[4] Bob Dylan, *Subterranean Homesick Blues* (1965); https://www.bobdylan.com/songs/subterranean-homesick-blues/.

> in the deponent's testimony or the adverse party's case. Were the same testimony given at trial, the party's cross motives would ordinarily be just the *opposite*—i.e., he or she would want to fully expose weaknesses in the testimony and the adverse party's case. Consequently, though the party's position is the same on both occasions, the dissimilar cross-examination motives and interests render the deposition testimony given on the prior occasion inadmissible under § 1291.

CAL. PRAC. GUIDE CIV. TRIALS & EV. (2019) ¶ 8:1409; emphasis added. Accord: *SIMONS CALIFORNIA EVIDENCE MANUAL* § 2:76.

Wahlgren, in contrast to *Berroteran*, discusses and is guided by this legislative history. There the appellate opinion affirmed the trial court's ruling that depositions of swimming pool manufacturer's officers, taken in a prior action, were properly excluded under section 1291 from a later personal injury action against manufacturer of a pool slide because the pool manufacturer did not have similar interests and motives in cross-examining the deponents. *Wahlgren* explained, by reference to the Assembly Judiciary Comment, the palpable difference between pre-trial deposition testimony of an aligned witness in one case and its admission as trial evidence in a different case involving the same defendant:

> All respected authorities . . . agree that given the [pre-trial deposition] hearing's limited purpose and utility, examination of one's own client is to be

> avoided. At best, such examination may clarify issues which could later be clarified without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense. [¶] In contrast, a trial serves to resolve any issues of liability. Accordingly, the interest and motive in cross-examination *increases dramatically*.

151 Cal.App.3d at 547; emphasis added.

A "dramatic increase" in the "interest and motive" for cross-examination of a party's aligned witnesses between pre-trial deposition in one case and trial in a subsequent but different case negates the required "similarity" of "interest and motive" required for admission under section 1291. See *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 695-696.

Letters from professional legal associations and business lodged with the Court in support of review of this opinion confirm the wisdom of this common knowledge and practice and the problems created for it by *Berroteran.* "*Berroteran* . . . requires that counsel treat every discovery deposition as if it were a trial knowing that it could . . . be admitted into evidence, even though is it almost never wise to cross-examine one's own witness at a discovery deposition."[5]

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[5] Joint Letter from the Association of Defense Counsel of
(continued...)

"[A]n attorney for a company producing a witness to testify pursuant to a deposition notice is preeminently focused on getting the witness through the deposition with as little 'damage' to the defense case and the witness's credibility as possible. [¶] An examination of the company witness at trial is an entirely different creature. There, counsel's role is to present a tightly organized and well-prepared examination intended to advance the themes of the defense case and persuade the jury of critical facts . . . ."[6] "The methods by which witnesses are presented at deposition . . . [and] will be presented at trial [are vastly different] because the 'interest and motive' for the party are always different between deposition testimony and trial testimony"[7] "[A] defendant's motivation to examine its own witnesses in the initial discovery phase of a class action is significantly different than it would be at a trial on the merits."[8]

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[5](...continued)
Northern California and Nevada and the Association of Southern California Defense Counsel, January 13, 2020, p. 3.

[6] Letter from the Product Liability Advisory Council, January 15, 2020, p. 3.

[7] Letter on behalf of Hyundai Motor America and SJL Law P.C., January 22, 2020, p. 1.

[8] Letter from the American Tort Reform Association,
(continued...)

Finally, where, as here, "a statute has been construed by judicial decision [*i.e., Wahlgren*], and that construction is not altered by subsequent *legislation*, it must be presumed that the Legislature is aware of the judicial construction and approves of it." *People v. Hallner* (1954) 43 Cal.2d 715, 719; emphasis added. This principle is an analogue to the doctrine of *stare decisis* (*People v. Fox* (1977) 73 Cal.App.3d 178, 181), which "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, [and] overruling the decision would dislodge settled rights and expectations . . .." *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504. "When a code section has received [uniform] interpretation for such a considerable period of time, namely, since the decision of [*Wahlgren*] in [1984] it would appear unwise for a court to change such interpretation . . .." *People v. Olf* (1961) 195 Cal.App.2d 97, 110. *Berroteran*'s express conflict with *Wahlgren* contravenes this established preference for legislative over judicial amendment of statutes by the guise of interpretation. The

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[8](...continued)
January 27, 2020, p. 2.

Court should stick with *Wahlgren* and leave *Berroteran*'s contrary construction of section 1291 up to the Legislature.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE DEPOSITION TESTIMONY UNDER EVIDENCE CODE SECTION 1291 AND TO AFFIRM *BERROTERAN* BY HOLDING OTHERWISE WILL LIKELY RESULT IN A PLETHORA OF APPEALS CHALLENGING COMPARABLE EXCLUSIONARY RULINGS.

All questions regarding "the admissibility of evidence" are decided by the court. Evid. Code § 310(a). The usual standard of review applies here: whether the trial court "abused its discretion" in granting the motion *in limine* to exclude deposition evidence. *People v. Alvarez* (1996) 14 Cal.4th 155, 201. Under this standard, the trial court's "discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered." *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32.

"Abuse of discretion" is the most difficult standard for an appellate court to overcome in reversing a trial court ruling or judgment, the "substantial evidence" and "de novo" standards coming below it and respectively next in line. To meet this standard the appellate court must show that the trial court exercised its discretion arbitrarily, exceeding "the bounds of reason, all of the circumstances before it being

considered” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566), and “so irrational . . . that no reasonable person could agree with it.” *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.

Berroteran acknowledges the high bar of the “abuse of discretion” standard and then proceeds to slip well under it while claiming to have cleared it. It achieves this by using “straw man” arguments about what *Wahlgren* says, as opposed to what the opinion really states. “[T]he straw man fallacy is committed . . . when [one] misrepresents [an] opponent’s position in order to refute it by making it seem implausible, or weaker than it really is, and then argues against this set-up version.” Douglas Walton, *INFORMAL LOGIC: A PRAGMATIC APPROACH* (2nd ed. 2008) 22. This Court regularly rejects “straw man” arguments advanced by parties or their counsel,[9] and should treat lower court opinions that employ this fallacious form of “reasoning” with equal disdain.

For instance, *Berroteran* faults *Wahlgren* by falsely claiming it establishes a “*categorical bar* to admitting

[9] See, *e.g.*, *People v. Green* (1980) 27 Cal.3d 1, fn. 28 (disapproved on other grounds): “We will not countenance the use of such a straw man to subvert either the orderly process of framing the issues . . . or the established rules governing the content of a record on appeal.”

deposition testimony under section 1291 based on the *unexamined premise* that a party's motive to examine witnesses at deposition always differs from its motive to do so at trial." 41 Cal.App.5th at 529; emphasis added. *Wahlgren*, however, says nothing of the sort. It merely observes that as a general matter "[a]ll respected authorities . . . agree that given the [deposition] hearing's limited purpose and utility, examination of one's own client is to be avoided"; and relies for that observation on common litigation knowledge and practice and the Assembly Judiciary Committee Comments accompanying the bill enacting section 1291. *Wahlgren*, *supra*, 151 Cal.App.3d at 546.

Berroteran cites no countervailing authority to *Wahlgren*'s actual statement about the standard practice in deposition hearings of "avoiding" examination of one's own witness, but seeks to bolster its attack on *Wahlgren* with another straw man argument—that *Wahlgren* itself "cites no support for its assertions that a deposition functions *only* as a discovery device." 41 Cal.App.5th at 533; emphasis added. Again, *Wahlgren* does not say that; it simply "note[s] that a deposition hearing *normally* functions as a discovery device" (151 Cal.App.3d at 546; emphasis added), an uncontroversial and widely accepted observation. See, *e.g.*, *Paley v. Superior*

Court (1955) 137 Cal.App.2d 450, 461 ([“T]he purpose of [a deposition] . . . is to develop facts bearing upon existing or potential issues.”); and *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1150 (“Former testimony from a deposition rather than a trial is problematic since depositions *generally function as a discovery device* where examination of one’s own client is typically avoided so as not to reveal weakness in the case or to prematurely disclose a defense.”) (Emphasis added). “Normal” and “only” are not synonymous adjectives; they are not even closely related. But *Berroteran*’s substitution of “only” for “normally” is obviously intended to prop-up its misleading claim that *Wahlgren* establishes a “categorical bar” to the admission of deposition testimony under section 1291 when it does not.

Further, *Berroteran* seeks to tear down its straw man claim that *Wahlgren* erects a “categorical bar” under section 1291 to the admission of deposition testimony by reference to federal authority interpreting the analogous Rule 804 of the Federal Rules of Evidence. While comparison between federal and state evidentiary rules on the admission of deposition testimony may well be useful and interesting, that they are “similar” does not mean they are the same. There is no indication in the legislative history of section 1291 that it was based on comparable federal law, and the difference in the

wording suggests a difference in meaning and application consistent with the "special deference owed to state law and state courts in our system of federalism." *Youngblood v. West Virginia* (2006) 547 U.S. 867, 874 (J. Scalia, dissenting). After all, "words matter,"[10] especially words comprising statutes.

The uniform federal law upon which *Berroteran* relies to concoct its own unique gloss on section 1291 consists of two cases, both of which involved depositions of *adverse*, not *friendly* witnesses. As the American Tort Reform Association explained in its letter brief to the Court:[11]

> *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492 involved the deposition of a former corporate officer who, in his deposition, was testifying *against* his former employer. *Id.* at 1504. *De Luryea v. Winthrop Labs., Div. of Sterling Drug, Inc.* (8th Cir. 1983) 697 F.2d 222, 226 involved the deposition of the plaintiff's former psychiatrist who, in his deposition, provided testimony directly adverse to his former patient. Neither was a case in which the motivation to examine or cross-examine

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[10] Justice Ruth Bader Ginsburg, *Advice for Living*, *N.Y. Times*, October 1, 2016: "At Cornell University, my professor of European literature, Vladimir Nabokov, changed the way I read and the way I write. Words could paint pictures, I learned from him. Choosing the right word, and the right word order, he illustrated, could make an enormous difference in conveying animage or an idea."

[11] *Ante* at p. 28, fn. 8.

> one's own client would differ depending on whether the context is a deposition or a trial. Neither supports the decision in this case.

Berroteran also flips the burden that applies to the proponent of admissible deposition testimony and instead places it on the party opposing its admission. "Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions." 41 Cal.App.5th at 534. This is a major departure from well-settled law, which places on the proponent of evidence sought to be admitted "the burden of establishing" all "foundational requirements for its admissibility." *People v. Morrison* (2004) 34 Cal.4th 98, 724; *Byars v. SCME Mortgage Bankers, Inc.*, *supra*, 109 Cal.App.4th at 1149-1150 ("Byars contends the trial court erred in excluding the deposition testimony of William Heyman . . . Byars bears the burden of showing Heyman's deposition testimony falls within an exception to the hearsay rule."). Even the federal authorities applying Rule 804 hold that the burden for introducing deposition testimony falls on the party seeking to do so, not the opposing party. See, *e.g.*, *United States v. Salerno* (1992) 505 U.S. 317, 322 ("The respondents . . . had no right to introduce DeMatteis' and Bruno's former testimony under Rule 804(b)(1) without showing a 'similar motive.' ").

Berroteran contends that the "interests and motives" of Ford to cross-examine its own friendly witnesses in pre-trial depositions for former cases was sufficiently similar to the trial in this case that the depositions should be admitted even though they lacked meaningful cross-examination by Ford's counsel. "Ford had a similar motive to disprove the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine." 41 Cal.App.5th at 534. But this overlooks *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1404, which holds that "[t]he decision as to whether the adverse party has a similar interest and motive in the two proceedings rests on practical considerations and is not resolved simply by finding that the party had a similar position in the two cases."

If *Berroteran* and its mistaken gloss on section 1291 is upheld, the likely result does not bode well for the administration of justice. Pre-trial depositions of a party's own friendly witnesses noticed by an opponent will, of necessity, turn into mini-trials, adding significantly to the cost and expense of litigation. Affirming *Berroteran* will encourage parties to piggy-back on the work of other counsel in other cases by quarrying out old depositions from around the country for use in future trials, obviating the need to engage in their own case-specific discovery. Further, if a trial court's

ruling on the admission or exclusion of deposition testimony pursuant to section 1291 is to be determined by the watered down “abuse of discretion” standard employed here, an influx of appeals will understandably ensue.

CONCLUSION

For all the aforementioned reasons, amicus urges the Court to reverse the order of the Court of Appeal and hold that (1) *Wahlgren* correctly construed and applied section 1291; and (2) the trial court properly exercised its discretion by ruling that the hearsay deposition testimony from earlier proceedings is inadmissible in the trial of this case.

Dated: November 20, 2020

/s/

Fred J. Hiestand
CJAC General Counsel

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Dated: November 20, 2020

/s/

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Supreme Court of California

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