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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

BRIEF OF *AMICUS CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE POSITION OF DEFENDANT/REAL PARTY IN INTEREST FORD MOTOR CO.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that have either (1) an ownership interest of 10 percent or more in The Product Liability Advisory Council, Inc., a non-profit association with no parent or subsidiary corporations (Cal. Rules of Court, rule 8.208(e)(l)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)).

I.

ISSUE PRESENTED

The general rule is that testimony of a witness in a prior case is inadmissible hearsay. The exception to that rule, stated in Evidence Code section 1291, requires the proponent of the evidence to establish that the adverse party had an interest and motive to cross-examine the witness at the prior proceeding that is similar to its interest and motive to examine the witness at the present trial.

Plaintiff Raul Berroteran II sought to introduce deposition testimony of employees and representatives of Defendant Ford Motor Company taken in prior cases involving similar subject matter. The trial court sustained Ford's hearsay objections, finding Plaintiff had not shown Ford's interest and motive to examine its own witnesses at the depositions to be similar to its motive and interest in examining the witnesses at trial. The court of appeal reversed on the ground that *Ford* had not shown that it's interest at the depositions and at trial was *dissimilar*.

Issue: Did the court of appeal misinterpret and misapply section 1291, and did it improperly shift the burden to Ford to establish dissimilarity of motive and interest, due to the similarity of the issues in the former and present cases?

II.

<u>IDENTITY AND INTEREST OF *AMICUS*</u>

The Product Liability Advisory Council, Inc. (PLAC) is a nonprofit professional association of corporate members representing a broad cross-section of American and international product manufacturers (including Ford). PLAC's corporate members include manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products to consumer goods.[1] In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (*i.e.*, nonvoting) members.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development and administration of product liability law or otherwise potentially impact PLAC's members. PLAC has submitted over 1100 *amicus curiae* briefs in state and federal courts, including many in this Court.

PLAC's interest in this appeal stems from the court of appeal's disturbingly broad interpretation of the admissibility of deposition testimony of company witnesses taken in other cases, and the impact it will have on product manufacturers in litigation in this State, and indeed, throughout the nation. If allowed to stand, the decision below threatens manufacturers with expansive and unfair use of the deposition testimony of

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[1] A current list of PLAC's corporate members is available at https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

their witnesses and substantially increased costs and burdens attached to the depositions of company employees.

III.
NATURE OF THE CASE

The trial court excluded from evidence deposition testimony taken from multiple employees and representatives of Ford in several cases challenging the quality of a diesel engine used in various Ford vehicles over five model years. The court applied section 1291 as interpreted in a similar context in *Wahlgren v. Coleco Indus., Inc.* (1984) 151 Cal.App.3d 543, and ruled that Plaintiff had failed to carry his burden to establish that Ford's interest and motive to examine the witnesses in their *depositions* in the prior cases was similar to Ford's interest and motive to examine them *at trial* in the present case.

The court of appeal reversed. Explicitly disagreeing with *Wahlgren*'s interpretation of section 1291 and the operation of the similar interest and motive requirement, the court found that similarity between some of the issues presented in the prior cases and the present case operated to flip the burden to Ford to demonstrate that it *lacked* a similar motive and interest in examining the witnesses. Concluding Ford had not carried that burden, the court held the trial court had abused its discretion by excluding the prior deposition testimony.

This Court granted Review. For the reasons stated below, it should reject the court of appeal's burden-shifting and

application of section 1291 in the context of prior deposition testimony, and reverse.

IV.

SUMMARY OF ARGUMENT

According to the clearly stated legislative history supporting section 1291, "[t]he 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." *See* California Law Revision Commission Recommendation Proposing an Evidence Code (Jan. 1965), comment to Section 1291, at 251-52 (hereafter "Law Revision Commission comment") (quoted in *Wahlgren*, 151 Cal.App.3d at 546). The court of appeal here erred in three ways: (1) misapprehending the tactical practice considerations that shaped Ford's interest at the depositions, (2) improperly elevating the "similarity of [Ford's] position in the two cases" to a burden-shifting presumption of similarity of interest and motive, and (3) misreading *Wahlgren* as imposing a "blanket rule" and "categorical bar" against admissibility of prior deposition testimony, and rejecting its analysis based on that misimpression.

In contrast, the *Wahlgren* court properly honored the intent of the Legislature by analyzing similarity of interest and motive based on a practical assessment of the real world interests and motivations of the defendant in examining (or declining to examine) its own witnesses at deposition in the prior case. The court reasonably determined that the

defendant's practical strategic calculus, consistent with the prevailing custom and practice in defending the deposition of a company witness, was to refrain from any significant examination of the witness and to save such examination for trial. The court thus concluded that the company's interest in the prior deposition was quite different from its interest in examining the witness at the later trial. And the court properly applied the basic, well-established rule that the proponent of the evidence bears the burden of establishing the conditions required for its admission.

The *Wahlgren* court recognized that, as a practical and tactical matter, at a company witness deposition the defendant's primary focus is minimizing any "damage" rather than proving its case. Because the proffered former testimony derived from a deposition rather than a trial examination, and the plaintiff failed to demonstrate that the defendant had an interest to examine the witness at the deposition similar to its interest at the subsequent California trial, the court found no abuse of discretion in excluding the testimony.

Wahlgren's understanding of the practical considerations facing a defendant defending the deposition of its own company witness was accurate, and remains so today. Absent unusual circumstances, such as a real threat (not merely a conceivable possibility) that a favorable witness will be unavailable for a likely trial, there is significant risk and little reward for the defendant to show its hand and thoroughly examine the deponent as it would at trial. Consequently, in most situations

there is a substantial disparity between the company's interest in "cross-examining" its own witness at deposition and its interest in directly examining its witness at trial. The court of appeals here, in contrast, imputed general preferences and practices to defendants at company witness depositions that are supported by neither evidence nor real world experience, and in fact at odds with actual custom and practice.

Simply put, from a defense perspective – the only one relevant under section 1291 in this case – a deposition of company employees or representatives is ordinarily a discovery event to survive, not a trial event to choreograph. *Wahlgren* got that right; the court of appeal did not.

Because the trial court applied the correct legal standard and properly assigned the burden of proof, the court of appeal was wrong to conclude there was an abuse of discretion. The judgment should be reversed.

V.

DISCUSSION

The core of this appeal is the conflicting views of Evidence Code section 1291 in *Wahlgren* and the court of appeal opinion in this case.

A. The Conflicting Cases

1. *Wahlgren v. Coleco Indus., Inc.*

Wahlgren was a product liability case brought against a pool manufacturer and other defendants involving a diving injury. Plaintiff appealed from a defense verdict, challenging the trial court's exclusion of the deposition testimony of the

manufacturer's representatives taken in a prior diving injury case in Massachusetts that had settled before trial.

In analyzing the operation of Evidence Code section 1291, the court of appeal relied on practical considerations and looked beyond the party's similar status and positions in the two proceedings, as instructed by the Legislature and the Law Revision Commission. *See Wahlgren*, 151 Cal.App.3d at 546 ("[A] determination of similarity of interest and motive … should be based *on practical* considerations and not merely on the similarity of the party's position in the two cases.") (quoting the Law Revision Commission comment) (emphasis by the court). The court noted that defense attorneys ordinarily take a very different approach to examination of their own company witness at depositions than they do at trial. The depositions are commonly regarded primarily as risky discovery procedures rather than the optimal opportunities to craft and communicate the company's case and persuade the jury that trials represent.

Practical considerations like these led the court in *Wahlgren* to reason that the defendant's motives and interests at deposition are ordinarily materially different from those at trial because the deposition "normally functions as a discovery device":

> [I]t should be noted that a deposition hearing normally functions as a discovery device. All respected authorities, in fact, agree that given the [deposition]'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 issue of liability. Accordingly, the interest and motive in cross-examination increases dramatically. Properly exercised, this right serves to clarify a litigant's position and may result in his or her complete exoneration.

Wahlgren, 151 Cal.App.3d at 546–47.

The court concluded that "[g]iven the practical differences between each of the proceedings involved," the interest and motive of the pool manufacturer in presenting its company witnesses at the Massachusetts deposition was sufficiently dissimilar from its interests at the California trial to justify the trial court's exclusion of the prior deposition testimony. *Id.* at 547. Accordingly, the trial court had not abused its discretion when it excluded the former testimony as inadmissible under section 1291.

The court's understanding of those practical differences in the deposition and trial contexts was well-grounded. Defense counsel producing a company witness to testify at the demand of the plaintiff 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. *See* authorities cited at pp. 23-27, *infra*. The central concern is protection, not persuasion. The shorter and more superficial the deposition the better; counsel is generally preoccupied with providing *less* opportunity for misstatement and contradiction by the witness, *less* material for impeachment of the witness at trial and

challenges to their credibility, and *less* likelihood of unnecessarily exposing defense strategy.

Accordingly, the default interest of defense counsel producing a company witness is to avoid prolonging the deposition. Unless something critically needs to be clarified immediately, at the deposition itself, there is typically no examination by defense counsel at all. Absent a true concern that the case may actually go to trial *and* the witness will by then be unavailable to testify, the custom and practice is to defer the "direct" examination of the company witness to the trial, if any. If the case does get to trial, counsel will then have had the advantage of additional opportunity to prepare the witness, informed by the complete discovery record and with the benefit of fulsome analysis of the witness's deposition testimony and its consistency with that of other witnesses.[2]

In contrast to the approach at deposition, counsel's goal at trial is to present a tightly organized examination to advance the themes of the defense case and persuade the jury of critical facts and the justness of the defense cause. Defense counsel's tactical calculus for examining the company witness at deposition and trial are as different as night and day.

2. *Berroteran v. Superior Court*

Thirty five years later, Division 1 of the Second District took a far different approach in the present case.

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[2] Of course, the overwhelming majority of cases do *not* actually go to trial – another important factor bearing on counsel's incentives at the company witness deposition.

Initially, the court of appeal fundamentally misinterpreted *Wahlgren* as "espous[ing] a *blanket proposition* that a party has a different motive in examining a witness at a deposition than at trial." *Berroteran v. Superior Court* (2019) 41 Cal.App.5th 518 (emphasis added).[3] Though the court in *Wahlgren* spoke generally in explaining the usual difference in trial and deposition motives and interests, it did not purport to issue a rigid rule that former deposition testimony is *always* inadmissible at trial, and it should not be read that way.[4] The court in *Wahlgren* was following the Law Revision Commission's direction that the trial judge should exclude a deposition taken in a prior proceeding but not offered at trial "*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

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[3] *See also* 41 Cal.App.5th at 529 ("we disagree with *Wahlgren*'s categorical bar to admitting deposition testimony under section 1291 …"); *ibid*. (criticizing 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 533 ("*Wahlgren* appears categorically to exclude deposition testimony from the section 1291 hearsay exception.").

[4] *Wahlgren* noted the practical consideration "that a deposition *normally* functions as a discovery device." 151 Cal.App.3d at 546 (emphasis added). "Normally" is not equivalent to "always"; it recognizes that sometimes it will *not* function in that manner. This is hardly the language of a "blanket rule" or a "categorical bar."

the adverse party's case." (Law Revision Commission comment, at 252) (emphasis added).

In burnishing its disagreement, the court of appeal transformed *Wahlgren*'s commonsense observations into an unyielding "assumption" "that deposition testimony is limited to discovery and has a 'limited purpose and utility.'" Having erected this straw man, the court then proceeded to knock it down:

> These assumptions, however, are unsupported by legal authority, inconsistent with modern trials and the omnipresence of videotaped depositions during trial, and contrary to persuasive federal law interpreting an analogous hearsay exception.

Berroteran, 41 Cal.App.5th at 521.

The court of appeal thus rejected the practical analysis of *Wahlgren* (and consequently its legal analysis) based primarily on three separate fallacies:

- *Wahlgren*'s understanding of the defense bar's approach to company witness depositions was unsupported;
- That custom and practice was, in any event, an anachronism, overtaken by technology and the evolution of modern trial practice; and
- *Wahlgren* was inconsistent with federal case law applying Federal Rule of Evidence 804.[5]

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[5] Ford's briefing thoroughly analyzes the federal authorities interpreting Federal Rule of Evidence 804 and the court of appeal's misguided reliance on inapposite cases. PLAC will not

Attacking the straw man "blanket rule" that depositions are *always* limited to discovery purposes only, the court observed that depositions are sometimes taken to preserve testimony for trial. They are, to be sure, but this is not inconsistent with *Wahlgren* – if the company actually undertakes to preserve the witness' testimony for trial, it is *not* treating the deposition as a mere "discovery device." That a defendant will occasionally decide to use a deposition to preserve the testimony of a company witness for trial – for example, a witness it fears may become unavailable – does not justify admission of those depositions where it does not.

Moreover, the intent of the *plaintiff* to preserve the company witness's testimony for trial in that case does not, and cannot, be said to alter the *defendant's* motive and interest in examining the witness at the deposition; under section 1291 it is only the opponent's interest and motive as to the witness that matters. The same general reluctance of defense counsel to "show their hand" or prolong the deposition may apply regardless of how the plaintiff approaches the deposition.

The court of appeal also reasoned that whether or not the defendant actually conducted a significant examination of its

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repeat that analysis here. However, PLAC notes that the court of appeal's view that the federal case law is inconsistent with *Wahlgren* is undermined by the same pervasive analytical flaw that plagued its interpretation of *Wahlgren* generally – the fallacious notion that *Wahlgren* read section 1291 to "categorically exclude" prior deposition testimony. Once that error is corrected, the perceived inconsistency between *Wahlgren* and the federal authorities falls away.

own witness is *irrelevant* to the motive and interest inquiry. 41 Cal.App.5th at 533. That logic is shortsighted, ignores the legislative command to focus on practical considerations, and elevates abstraction over compelling objective evidence. If defense counsel has a significant motive and interest to examine the witness to elicit affirmative testimony from the witness at the deposition, then ordinarily they will do so. Though not by itself dispositive, that counsel deferred examination is usually, as a practical matter, a cogent indication of disinterest in adducing the witness's trial testimony in advance of trial. In other words, they treated the deposition as a discovery device.

Accordingly, whether or not counsel actually conducted an examination of the witness at the deposition, and if so the extent of the examination, are important considerations in the similarity of interest inquiry. The court of appeal offered no compelling explanation for why counsel who remains silent at the deposition should be thought to have a motive and interest roughly equal to that at trial. None appears.

B. The Court of Appeal's Rationale for Rejecting *Wahlgren* Lacks Merit

As noted, the court's primary disagreement with *Wahlgren* was its view that depositions of company witnesses are *not* primarily discovery devices, at least in the modern era; nowadays, the court explained, depositions are often videotaped, and those videos are often played at trial. But *Wahlgren*'s understanding of

the prevailing custom and practice in the defense bar was accurate, and it remains so today.[6]

The court of appeal's critique began by criticizing *Wahlgren*'s failure to cite any "legal authority" "for its assertions that a deposition functions only as a discovery device," finding "that assumption" "at best outdated given the prevalence of videotaped deposition testimony in modern trial practice," and inconsistent with the reality that cases often overlap substantively across different jurisdictions and that witnesses sometimes become unavailable. *Id.* at 533. Ironically, the court of appeal "cite[d] no support for its assertions" about modern litigation practice.[7]

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[6] How the rise in videotape depositions modifies the defense approach and the similar interest and motive analysis was not explained by the court of appeal, and is not apparent. As Ford argues, that plaintiffs often present company witness testimony at trial by videotape rather than by read-ins from the stand is a change in form only, and has no significant bearing on the admissibility analysis. It does not diminish the defense's ordinary reluctance to expose the witness at deposition, nor alter the abiding preference to offer favorable testimony through a live presentation at trial.

[7] It is true that *Wahlgren* cited no authority for its observations about the prevalent custom and practice, apparently relying on collective experience and the views of the Law Revision Commission. The court apparently felt no need to cite authority for such a well-accepted experiential proposition. Indeed, the court essentially said so – "[a]ll respected authorities, in fact, agree that given the [deposition]'s limited purpose and utility, examination of one's own client is to be avoided." 151 Cal.App.3d at 546.

The best evidence of how lawyers view depositions and prepare for and conduct them is the published secondary literature where lawyers describe how they practice and offer practical advice to colleagues in the bar. The court of appeal cited none of this scholarship. In fact, the practice literature reveals that *Wahlgren*'s understanding that defense lawyers treat company witness depositions as defensive discovery, not trial events, accurately reflects the ongoing custom and practice.

If, as the court of appeal here suggested, defendants routinely use company witness depositions as opportunities to document affirmative testimony for trial, then "best practice" guides would surely reflect that practice and describe this aspect of deposition preparation and conduct. But Ford cites several practice guides that affirmatively advise practitioners to exercise caution before examining one's own witness, for common strategic reasons. Ford's Opening Brief at 43-44. And that merely scratches the surface. The "how-to" practice literature largely omits any recommendation to prepare to conduct, or conduct, a trial-type examination of the company witness, and instead focuses solely on how to prepare the deponent to withstand the adversary's examination.

* * *

See, *e.g.*:

- Sheila Kazemian & J. Lewis Glenn, Jr., *A Defense Approach to the 30(B)(6) Deposition*, FOR THE DEFENSE, January 2020, at 38;
- Lauren Bragin, *A Primer on Rule 30(b)(6) Witnesses*, FOR THE DEFENSE, April 2015, at 26;

- Alan Hoffman, *Being There: Preparing Witnesses for Depositions*, LAW 360 (Oct. 30, 2017), *available at* https://www.law360.com/articles/979008/being-there-preparing-witnesses-for-depositions (last visited Nov. 18, 2020);

- Michael Freeman, *Circling the Wagons: Preparing For the Showdown* (March 5, 2016), *available at* https://brownjames.com/news/circling-the-wagons-preparing-for-the-showdown/ (last visited Nov. 18, 2020);

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- Allegra Lawrence-Hardy & Jessica Sawyer Wang, *Gain Leverage with a 30(b)(6) Deposition*, BLOOMBERG LAW REPORTS (Aug. 10, 2009), *available at* https://us.eversheds-sutherland.com/mobile/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuWpDu0!/fileUpload.name=/2009%20A.%20Lawrence-Hardy%2C%20J.%20Wang%20Gain%20leverage%20with%20a%2030b6%20deposition%20(Bloomberg%20Law%20Rep.pdf (last visited Nov. 18, 2020);

- Edmundo O. Ramirez & Minerva I. Zamora, *How to Adequately Prepare and Present a Designated Corporate Representative*, STATE BAR OF TEXAS 5th Annual Advanced In-House Counsel Course (Aug. 3-4, 2006), *available at* http://www.texasbarcle.com/Materials/Events/6098/72699_01.pdf (last visited Nov. 18, 2020);

- Michael Lyle et al., *How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition*, PRACTICAL LAW COMPANY (2011), *available at* https://www.weil.com/~/media/Files/PDFs/PrepareDefendRule30b6Deposition.pdf (last visited Nov. 18, 2020);

- *Leave No Stone Unturned: Preparing Your Corporate Witness For Deposition*, DEUTSCH KERRIGAN INSIGHTS (Jan. 29, 2019), *available at* https://www.deutschkerrigan.com/news-insights/insights/leave-no-stone-unturned-preparing-your-corporate-witness-for-deposition (last visited Nov. 18, 2020);

- Martin D. Beier, *Organizational Avatars: Preparing CRCP 30(b)(6) Deposition Witnesses*, 43 THE COLORADO LAWYER 39 (Dec. 2014);

- Susan F. DiCicco et al., *Specialized Deposition Techniques 2018* (Substantive Outline) PRACTICING LAW INSTITUTE (Item 220493);

- Marilyn Heffley et al., *Preparing and Protecting the Company and Its Witnesses at Deposition and Trial* (2010),

available at https://www.acc.com/sites/default/files/resources/vl/membersonly/ProgramMaterial/1267614_1.pdf (last visited Nov. 18, 2020);

- Daniel P. Dain, *Taking or Defending a Liability Deposition*, excerpted from HOW TO PREPARE FOR, TAKE AND USE A DEPOSITION, *available at* https://www.jameseducationcenter.com/articles/defending-liability-depositions/ (last visited Nov. 18, 2020); and

- Michael L. Miller, *The Deposition of the Trucking Company Safety Representative* (Jan. 16, 2015), *available at* https://www.martindale.com/transportation-law/article_Drew-Eckl-Farnham-LLP_2187560.htm (last visited Nov. 18, 2020).

* * *

In the practice guides that do mention conducting some examination, the discussion is comparatively terse and reveals that such examinations are rare, either for the purpose of preserving the testimony of a likely unavailable witness, or to clarify or correct a point or two with a limited examination.

* * *

See, e.g.:

- *Basic Deposition Procedures* (May 1, 2003), *available at* https://www.rutan.com/basic-deposition-procedures/ (last visited Nov. 18, 2020):

> Only in rare cases will a company feel the need to take depositions of its own employees (i.e., usually only to preserve because an employee may be about to move or may be terminally ill, etc.). As a result, ordinarily you will be examined at a deposition by the lawyers for the other side.

- Bryce L. Friedman, *Taking and Defending Depositions* (March 6, 2018) at 165, PRACTICING LAW INSTITUTE (Item 276169):

> Examining your own witness:
>
> (i) This should be considered when the witness will likely not be available at trial.
>
> (ii) Necessary to clarify or correct testimony on a significant issue.
>
> (iii) Remember: Your cross-exam will expose the witness to further redirect examination.

See also Craig C. Martin & Anthony B. Borich, *Preparing Your Witness for Deposition: Best Practices*, *available at* https://jenner.com/system/assets/assets/6170/original/Witness_Preparation_031611.pdf?1327965786 (last visited Nov. 18, 2020) ("If a witness is not expected to be available to testify later, counsel should ensure that a complete record of the witness' favorable knowledge is established.").

* * *

In addition, practice guides approaching company witness depositions from the perspective of plaintiffs' counsel commonly make no mention of any need to expect, prepare for, or respond to, a defense cross-examination.

* * *

See, *e.g.*:

- Andres Rivero & Jorge A. Mestre, *Deposing Nonhumans: Corporate Representative Depositions in Florida*, 79 FLORIDA BAR JOURNAL No. 1 (Jan. 2005) at 54;

- Ken Shigley, *7 Reasons Insurance Defense Lawyers Hate 30(b)(6) Depositions in Trucking Cases*, available at

https://www.atlantainjurylawyer.com/files/shigley_-_7_reasons_insurance_defense_lawyers_hate_30b6-_gtla_april_2015.pdf (last visited Nov. 18, 2020);

- Adam Blank, *Five Strategies for Rule 30(b)(6) Depositions*, TRIAL (August 2007) at 40; and
- Casey Kaufman & Brian Malloy, *The Person Most Qualified Deposition – Tools and Tips*, FORUM, March/April 2016, at 16.

* * *

In sum, the practical literature demonstrates that the picture painted by the court of appeal of a drastically different modern litigation landscape significantly modifying the defense custom and practice concerning company witness depositions is not just unsupported; it is demonstrably and vastly off the mark.

Importantly as well, nothing about section 1291 itself has changed over the years to adapt to any changes in technology or practice. If the realities of modern practice called for a different approach to the admissibility of former deposition testimony and a departure from well-settled long-standing rules, then the preferred mechanism would be legislative reappraisal rather than judicial disagreement. The Codes have been substantially amended to reflect the availability and use of videotaped testimony, but without any accompanying change to the terms of section 1291, nor any modification of the legislative commentary. Though advances in videotaping technology have changed the medium for presentation of deposition testimony at trial, they have not changed the admissibility standard or the motive and interest analysis.

C. There is No Basis for the Court of Appeal's Reversal of the Burden of Proof

The court of appeal here went further than mere disagreement with *Wahlgren* and recalibration of the admissibility calculus; it suggested that where there is identity or overlap of issues between the prior and present actions, the burden shifts to the opponent of the evidence to establish that its motives and interests in examination of the witness at the deposition were *dis*similar. *See, e.g.,* 41 Cal.App.5th at 534 (reversing because Ford failed to adequately explain why its motive at deposition differed, and "made no showing that it lacked similar motive to examine its witnesses during their depositions").

Such a shift would not merely be unprecedented and unsupported; it would run afoul of the well-settled general rule that the proponent of the evidence bears the burden of establishing the predicates for its admission, including the requirements for an exception to the hearsay rule. *See, e.g., People v. Lucas* (1995) 12 Cal.4th 415, 441-42, 444; *People v. Beeler* (1995) 9 Cal.4th 953, 978; *People v. Bonin* (1989) 47 Cal.3d 808, 847. The court identified no principled basis for this radical revision of the operation of the rules of evidence, and none exists. Bare similarity of the issues and positions is not enough to justify admission, nor is it the primary factor in the similarity analysis. *See* Law Revision Commission comment, at 251-52 ("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.").

D. The Court of Appeal's Expansive Approach to Admissibility of Former Deposition Testimony Would Negatively Transform the Conduct of Depositions, Significantly Increase the Burdens and Costs of Discovery, and Unfairly and Disproportionately Prejudice Product Manufacturers.

Litigation is expensive. Much of that expense is attributable to the discovery process. One of the drivers of discovery costs on the defense side in product liability cases is the amount of preparation and work customarily devoted to preparing company witnesses for their depositions, especially depositions of designees on behalf of the company required to address numerous subjects under procedures such as those set forth in Fed. R. Civ. P. 30(b)(6) and C.C.P. § 2025.230.

But as costly as it is to prepare to defend these depositions, that cost would skyrocket if the court of appeal's view of admissibility of former deposition testimony under section 1291 were adopted. In addition to the high cost of extensively preparing company witnesses to fulfill discovery obligations and emerge from the plaintiff's examination relatively unscathed, defense counsel would need to also prepare, prepare the witness for, and then conduct a premature trial examination. Under *Wahlgren* that burden can usually be avoided: (1) trials are relatively rare events, and (2) the company witness can usually be expected to be available if the case does happen to go to trial, and can be prepared to testify in support of the defense at that time, if necessary. Under the court of appeal's approach, however, these costs and burdens could not be safely deferred.

Though the overwhelming majority of cases do not go to trial, virtually every case against a product manufacturer includes the taking of depositions, and frequently they involve depositions of company employees or representatives. The court of appeal's analysis would increase drastically the likelihood of company witness depositions surfacing at trials in future cases. Consequently, the strategic calculus for cautious defense counsel defending a deposition of the company witness would change radically, inevitably leading to lengthier, costlier, and more burdensome depositions, increased litigation costs generally, and increased pressure to settle even very questionable cases.

Simply put, if company witness depositions are routinely prolonged and complicated, becoming tantamount to full trial examinations — despite the fact that a trial remains highly unlikely — the already daunting problem of the prohibitively high cost of litigation is about to get even worse.

There is no pressing need to broaden the admissibility of former deposition testimony of company witnesses in future cases. The witness (or another with comparable knowledge) will often be available for live trial testimony in the future case, and if not, then the witness may be deposed for trial *in that case* and fully examined to preserve their testimony. And prior *trial* testimony of the company witness stands on materially different admissibility footing.

Broadening admissibility also presents issues of fairness. In cases involving mass-produced products capable of contributing to injury, the organized plaintiffs' bar collects libraries of company

witness deposition transcripts. If prior deposition testimony is freely admissible, plaintiff's counsel can pick and choose among the prior cases to select the one deemed most effective or damaging – essentially cherry-picking from a menu of former testimony.

Assume hypothetically that a company witness testifies in ten different cases about the design of a specific component, ably fending off argumentative questions to testify clearly and forcefully in nine of them, but succumbing to a particularly aggressive and adept lawyer in the tenth. That single outlier transcript where the witness's words were twisted in problematic and misleading ways may become the Bible of the company's testimony in future cases, following the company around from courtroom to courtroom.[8] Indeed, the repeat nature of company witness depositions itself becomes a litigation pressure point. Plaintiffs' counsel and the plaintiffs themselves are not similarly encumbered.

In sum, the court of appeal's expansive approach to admissibility of former company witness deposition testimony would transform the manner in which company witness depositions are conducted, and pose public policy concerns regarding litigation cost and fairness. For this additional reason,

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[8] Additionally, if counsel in the prior case chose not to clutter the record with repetitive objections to the form of the opponent's questions, under section 1291(b) objections to the form of the argumentative questions will not be preserved for the future trial.

the court of appeal's approach is problematic, and should be rejected.

VI.

CONCLUSION

The decision of the court of appeal misreads prior authority, misapprehends the prevailing custom and practice in defending company witness depositions, and unnecessarily threatens serious and costly changes to deposition practice that disproportionately burden and prejudice product manufacturers.

In contrast, the longstanding interpretation of Evidence Code section 1291 and continuing defense practices in defending company witness depositions operate smoothly, and should be preserved.

For the foregoing reasons, the Court should reverse the decision of the court of appeal.

Dated the 20th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1)of the California Rules of Court, the enclosed Amicus Brief of Curiae Product Liability Advisory Council on the Merits is produced using 13-point Century Schoolbook type including footnotes and contains approximately 5,428 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 27th Floor, San Francisco, California 94111.

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