S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

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

RESPONSE TO AMICUS CURIAE BRIEFS

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RESPONSE TO AMICUS CURIAE BRIEFS

INTRODUCTION

Ford Motor Company respectfully submits this consolidated response to the amicus curiae briefs filed in support of Raul Berroteran II.

The briefs supporting Berroteran raise three main arguments, largely ones Berroteran made in his own brief: (1) that *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*) misread Evidence Code section 1291 (section 1291) by supposedly creating a blanket bar against admitting deposition testimony in later actions; (2) that this Court should hold that litigants are presumed to have a motive to cross-examine witnesses at depositions, and the party invoking the statutory exception to the hearsay rule is thus relieved of the burden of demonstrating that the statutory terms are met; and (3) that state courts should apply Evidence Code section 1291 in the same way federal courts apply rule 804 of the Federal Rules of Evidence.

For the reasons discussed below, none of those arguments has merit.

LEGAL ARGUMENT

I. *Wahlgren* properly did not create a bright line rule barring the admission of deposition testimony in later cases, and Ford does not advocate for such a rule.

The Court of Appeal expressly disagreed with *Wahlgren*, and in its merits briefs to this Court, Ford has argued that *Wahlgren* was correctly decided, accounting both for the governing statutory language and the realities of discovery and trial practice. (OBOM 25-48.) In his answer brief on the merits, Berroteran argued that *Wahlgren* misconstrued section 1291 by creating a "blanket bar" to admitting deposition testimony taken in a prior case whenever the party opposing admission chose in the earlier proceeding not to question the witness. (ABOM 10, emphasis omitted.) The briefs filed by Consumers for Auto Reliability and Safety and related parties (collectively CARS) and Consumer Attorneys of California (CAOC) echo this point. (CARS ACB 6; CAOC ACB 7.) The argument is not well taken.

To place the argument in context, the text of section 1291 bears repeating. It is not a statute specifically about prior deposition testimony. Rather, it speaks more generally to "former testimony," which includes prior *trial* testimony. (§ 1291, subd. (a).) And even for prior trial testimony, the statute creates an exception to the rule against admitting hearsay evidence only upon a showing of both necessity (the witness must be "unavailable" to call as live) and fairness—the proponent of the evidence must convince the trial court that the objecting party is essentially in the same position as if the witness *had* been called

live in the later trial or other hearing, because the objecting party "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (*Id.*, § 1291, subd. (a)(2).)

As Ford explained in its reply brief, *Wahlgren* faithfully applied the statute when it affirmed a trial court's factual conclusion that the defendant in that case, like defendants in most cases, had no motive to cross-examine its own employees when they were deposed by opposing counsel in prior litigation. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) Based on that finding, the trial court ruled the testimony was not admissible under section 1291. (*Id.* at p. 547; RBOM 14-15.) In upholding that factual conclusion, the Court of Appeal observed that the ruling was in line with the Legislature's own observation that examination of one's own employees at a deposition initiated by opposing counsel is generally to be avoided. (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 546.)

However, the court did not hold that deposition testimony can *never* be admitted. If the moving party presents evidence that the opposing party *did* have a motive in the prior litigation to cross-examine a witness—for example, because the parties in the earlier proceeding agreed the testimony would be used at trial instead of live testimony, or the witness made clear that he or she would not be available for the objecting party to call at trial—*Wahlgren* would not preclude a court from admitting the evidence in a later trial. These are objective factors that would permit the deposition testimony to be introduced at future trials

even if the objecting party for whatever reason chose not to cross-examine the witness, or chose to limit its cross-examination.

In this case, as in *Wahlgren*, Berroteran did not satisfy the trial court that Ford, which did not in fact cross-examine the witnesses aligned with its own position during their depositions in earlier litigation, nonetheless had an interest and motive to do so. Anyone familiar with real-world deposition and trial practice would have thought it odd for Ford to inject cross-examination into a class action deposition given the strategic reasons *not* to do so. Ford had every reason to believe that, in the highly unlikely event that the class action ever went to trial, it could call the witnesses to testify live, without having previewed its defense theories for the other side during the depositions. It was the lack of convincing evidence of what would have been an unusual motive and opportunity in the prior litigation, not a categorical bar against admitting deposition testimony, that animated the trial court's ruling and that should have resulted in the Court of Appeal affirming the ruling.

II. This Court should reaffirm the rule that a party who wishes to introduce hearsay testimony from prior litigation bears the burden of showing that the conditions set forth in Evidence Code section 1291 are met.

It is the rule, not the exception, to exclude hearsay testimony. Untested statements may be unreliable for many reasons. Important context may be missing, statements may be incomplete and thus misleading, and the source of the declarant's opinion or recollection may be weak—and none of these problems

can be explored when hearsay evidence is admitted. But amicus curiae CARS would make *admission* of hearsay evidence under section 1291 the rule rather than the exception. CARS says courts should simply presume that parties *do* have a motive to cross-examine a witness aligned with their side of the case during depositions called by opposing counsel. (CARS ACB 8-10.) CARS's position that courts should indulge that presumption lacks merit for two reasons.

First, whether a party had a motive to cross-examine a witness raises a factual question that should be resolved on the basis of the facts, not on the basis of presumptions. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 525-526 ["The issues at the suppression hearing and at trial were sufficiently distinct that the trial court could reasonably conclude that the People lacked a similar interest and motive to cross-examine Taylor"]; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1404 [The party that sought leave to introduce deposition testimony "did not show . . . that Novartis had a similar interest and motive in examining the experts in the *Soldo* case and in this one. '[S]imilarity of interest and motive must be determined on practical considerations, not merely the similar position of the parties in the two cases.' "].) *People v. Sul* (1981) 122 Cal.App.3d 355, 367, the only case CARS cites for the proposition that there should be a presumption that deposition testimony is admissible (CARS ACB 8), does not mention any presumption. The court's analysis focused on whether, in a criminal trial, introducing prior sworn testimony from a preliminary court hearing used to

determine whether there was probable cause to commit the defendant to trial violated the confrontation clause of the federal Constitution. (*Sul*, at pp. 367-369.) The case has no bearing here.

CARS's argument also violates the across the board rule that the party who seeks leave to introduce hearsay evidence under any type of exception has the burden of proving that the conditions for admitting hearsay exist. (*People v. Morrison* (2004) 34 Cal.4th 698, 724 ["The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule"].) CARS's position that deposition testimony should be presumed to be admissible would relieve Berroteran of that burden, making section 1291 an exception to the rule for proving hearsay exceptions. (See RBOM 32-33 [responding to the same argument raised in Berroteran's brief].)

Finally, CARS's position that parties should be presumed to have a motive to cross-examine employees at their depositions is contrary to the realities of trial practice to which we have alluded. As the Products Liability Advisory Council (PLAC) explains in its amicus brief, "at a company witness deposition the defendant's primary focus is minimizing any 'damage' rather than proving its case. . . . [¶] . . . [T]here is significant risk and little reward for the defendant to show its hand and thoroughly examine the deponent as it would at trial." (PLAC ACB 13.) Given this strategic reality, acknowledged by the Legislature

itself in the note it appended to the statute (see RBOM 20-21), any assumption that parties have a motive to cross-examine friendly witnesses is entirely unsupported.

III. Federal cases raising issues under Federal Rules of Evidence, rule 804 provide no reason to depart from *Wahlgren*'s interpretation of Evidence Code section 1291.

CARS repeats Berroteran's argument that the Court of Appeal's interpretation of Evidence Code section 1291 aligns with the federal courts' interpretation of the hearsay rule exception in rule 804 of the Federal Rules of Evidence rather than the interpretation adopted in *Wahlgren*, *supra*, 151 Cal.App.3d 543. (CARS ACB 8-9.) The argument rests on a misconstruction of the federal rule, which in any event should not dictate a state rule contrary to that contemplated by the California Legislature when enacting Evidence Code section 1291.

In its reply brief on the merits (see RBOM 24-30), Ford explained that federal courts, like state courts, treat motive for purposes of an exception to the hearsay rule as a factual issue on which the proponents of the hearsay evidence bear the burden of proof. (*U.S. v. Carson* (D.C. Cir. 2006) 455 F.3d 336, 378 ["appellants have failed to show how the motive to develop the testimony of Owens and Pinkney before the grand jury was similar to the motive to develop their testimony at trial"]; *Battle v. Memorial Hosp. at Gulfport* (5th Cir. 2000) 228 F.3d 544, 552 (*Battle*) ["the similar-motive inquiry is inherently a factual inquiry, depending in part on the similarity of the underlying issues and on the context of the questioning"].)

CARS, however, suggests that motives driven by litigation strategy should not be considered as part of the factual inquiry, relying on *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506. (CARS ACB 8-9.) The Eleventh Circuit in that case, like the Court of Appeal here, held that "as a general rule, a party's decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude his adversary's use of the deposition at a subsequent proceeding." (*Hendrix*, at p. 1506; see typed opn. 3, 19-20.) In *United States v. Feldman* (7th Cir. 1985) 761 F.2d 380, 385, abrogated on another ground in *United States v. Rojas-Contreras* (1985) 474 U.S. 231, 232, fn. 1 [106 S.Ct. 555, 88 L.Ed.2d 537], the court rejected the *Hendrix* analysis, holding that a litigant's strategic decision not to cross-examine a witness can *support* the lower court's conclusion that the litigant had no motive to question a witness. Because the Legislature in section 1291 set up no artificial limitation on the factual considerations that go into a party's interest and motive to conduct cross-examination, the reasoning of the Seventh Circuit is more in line with California law than the Eleventh Circuit.

The other federal cases that CARS cites, in which appellate courts affirmed a trial court's decision to admit deposition testimony, turned on the trial court's factual findings, not presumptions about whether the testimony was admissible. (See *Battle*, *supra*, 228 F.3d at pp. 552-553 [party opposing admission *did* cross-examine the deponent and did not suggest any further lines of inquiry she could have pursued]; *Pearl v. Keystone*

Consol. Industries, Inc. (7th Cir. 1989) 884 F.2d 1047, 1052 [rejecting objecting party's position that she lacked time to attend the deposition]; *Murray v. Toyota Motor Distributors, Inc.* (9th Cir. 1982) 664 F.2d 1377, 1379 ["TMD and TMS had a 'similar motive' in that case and this to cross-examine Garrett as to the existence of the policy"].) CARS cites *Horne v. Owens-Corning Fiberglas Corp.* (4th Cir. 1993) 4 F.3d 276, 282-283, but in that case, motive was not the issue. The case turned on a privity issue: whether the litigant in the prior case was Horne's predecessor in interest. (*Ibid*; see Fed. Rules Evid., rule 804(b)(1)(B) [testimony from prior litigation admissible where "predecessor in interest had [ ] an opportunity and similar motive to develop [testimony] by direct, cross-, or redirect examination"].)

In any event, as Ford explained in its reply brief (RBOM 28-29), the federal rules have little bearing on how courts should construe section 1291. The legislative history of section 1291 explicitly states that strategic decisions *do* play a role in analyzing a party's motives during a deposition. As the Legislature explained, deposition testimony should not be admitted in subsequent cases if the party opposing admission "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." (Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291, subd. (a)(2).) The flaw in the Court of Appeal opinion here and in the amicus briefs

supporting the opinion is that they give no weight to this clear expression of legislative intent.

CONCLUSION

For the foregoing reasons, the Court should reject the arguments in the CARS and CAOC amicus curiae briefs, and affirm the interpretation of Evidence Code section 1291 adopted in *Wahlgren* and applied by the trial court in this case.

December 23, 2020

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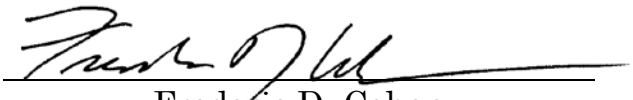
By: 
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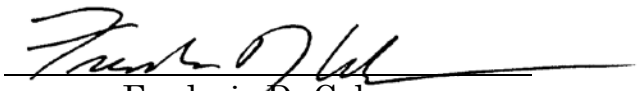

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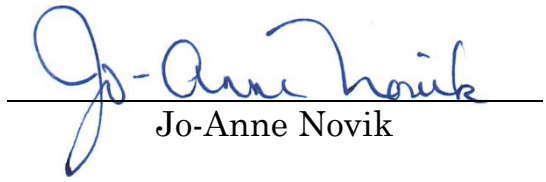

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