S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner and Respondent,

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Berroteran denies that this case presents a conflict the Court needs to resolve. His contention is belied by the first sentence of the opinion: "This case puts us in the unenviable position of disagreeing with our sister court as to the admissibility under Evidence Code section 1291, subdivision (a)(2) of former testimony." (Typed opn. 2.)

Wahlgren v. Coleco Industries, Inc. (1984) 151 Cal.App.3d 543 (*Wahlgren*), the opinion the Court of Appeal here was referring to, is indeed in direct conflict with the court's opinion. Contrary to Berroteran's position, the opinion in *Wahlgren* is as valid today as when it was decided: it is consistent with modern litigation practice and more recent opinions of this Court, and it is based on established hearsay rules that have not changed.

Berroteran also denies that the court's opinion will impose significant additional burdens on counsel attending a deposition noticed by an opposing party. Of course it will. The opinion puts lawyers on notice that—even when there is no reason to believe a witness will be unavailable to testify live in the trial for which a deposition is being taken—counsel must elicit all the testimony they might want to put on at this or any other trial. Under this rationale, depositions will routinely become mini-trials, with all sides' lawyers doing direct, cross, redirect, and recross examination. The court assumes that, nowadays, every deposition is a "preservation" vehicle excepted from the hearsay rule by Evidence Code section 1291 (section 1291), not just in the current case, but in any future case raising related issues.

Berroteran says that is already the state of the law under Federal Rules of Evidence, rule 804 (28 U.S.C.). But in describing the limited hearsay exception for prior deposition testimony, rule 804 and Evidence Code section 1291 use materially different language. To be sure, many jurisdictions (including California) presume deposition testimony is admissible *at the trial for which the deposition was taken*. But in the context of using deposition

testimony in later cases, the Court of Appeal went considerably farther than federal courts have gone, opening the section 1291 door wide to using hearsay deposition statements out of context—in cases brought years later, in jurisdictions other than the original case for which the deposition was taken, involving different parties, counsel, and different claims.

Under the rule adopted by the Court of Appeal, parties defending against institutional claims, as Ford is here, will have to respond to hearsay testimony that has never been tested by cross-examination because defense counsel will not know in an existing proceeding what questions might become relevant in future litigation. Parties will also be compelled to reveal their trial strategy during the course of a deposition of a witness aligned with the party's position, or to ask cross-examination questions that undermine a witness before the opponent has decided what, if anything, to present at trial from that witness.

In sum, *Wahlgren* correctly held that it is rare for a party to have a motive to disprove its opponent's case by way of cross-examining friendly witnesses *during a deposition.* The Court of Appeal here declared the opposite—placing the burden on the objecting party to demonstrate the *lack* of a *presumed* motive to engage in such cross-examination, and holding that strategic considerations do not count as valid motives. This Court should grant review and hold that, unless the *proponent* of the hearsay evidence establishes the requisite motive, the testimony is not admissible in future cases under section 1291.

LEGAL ARGUMENT

Deposition practice is a bedrock of litigation. Guidance from this Court is required to clarify what the proper scope of depositions should be, including whether and how hearsay deposition testimony may be used in subsequent litigation.

A. The Court should grant review to resolve the conflict between *Wahlgren* and *Berroteran* concerning the admissibility at trial of hearsay deposition testimony taken in other cases.

Berroteran does not dispute that there is a direct conflict between *Wahlgren* and *Berroteran*. Instead, he suggests *Berroteran* should stand as the last word on the subject, arguing that *Wahlgren* is "unsupported" and "poorly-reasoned" and rests on an assumption that Berroteran considers "outdated": that " 'a deposition hearing normally functions as a discovery device . . . .' " (APFR 30-31.) Central to Berroteran's position and the Court of Appeal opinion is that videotaping of depositions is more common than it used to be. But placing a camera in front of the witness gives trial counsel no reason to anticipate that hearsay depositions will routinely be admitted at trial—especially in future trials years down the road, involving different parties, counsel, and claims, as here—in place of live testimony. In the real world, parties and witnesses are still called to the stand. And absent a stipulation to the contrary, their depositions are used only as needed for

impeachment by the side that noticed the deposition in the first place at the trial in which the deposition occurred.

The practice of videotaping depositions did not change the hearsay rules, and a deposition, whether transcribed or videotaped, is not admissible unless it comes within an exception to those rules. Because the hearsay rules have not changed, *Wahlgren*'s analysis of the scope of the hearsay exception created by section 1291 is just as relevant for videotaped depositions as it is for depositions that are transcribed and read to the jury.

The rationale underlying *Wahlgren* also has not changed. *Wahlgren* reasoned that an attorney will rarely have a motive to cross-examine a witness aligned with the attorney's side of the case because, "[a]t 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." (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) That is just as true when the deposition is videotaped as it is when the deposition is transcribed by a reporter.

Wahlgren's interpretation of section 1291 is also consistent with the Legislature's own interpretation of the statute. In a comment now appended to section 1291, the Assembly Committee that recommended adopting the bill explained that courts should not admit deposition testimony 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." (Typed opn. 23-24, fn. 10.) This legislative intent

was not tied in any way to whether the deposition was videotaped. When the Legislature authorized videotaping depositions in 1986, it left intact the rules that governed when deposition testimony was admissible.

Contrary to Berroteran's position, the Assembly Committee, when it explained that section 1291 deposition testimony would rarely be admissible in later cases, drew no distinction "between deposition testimony intended to *be used at trial* and deposition testimony that was *solely* for discovery purposes." (APFR 34.) It is unclear whose "intent" would be material to that supposed distinction, and how it would be discerned, but the concept of such a distinction appears nowhere in the Assembly Committee report, for good reason. In 1965, when the Legislature adopted section 1291, depositions could be admitted *at the trial at which the deposition was taken*, and the same is true today, under the same circumstances that deposition testimony is admissible under Code of Civil Procedure section 2025.620. (See Stats. 1957, ch. 1904, § 2016, subd. (d).)

There is thus no such thing as a deposition that was "never intended to see the light of day in court." (APFR 32, 35.) The question here is whether hearsay statements from a deposition may permissibly be used in a future case to the same extent as those statements can be used in the case for which the deposition was taken—when only the latter scenario includes the participation of the same counsel for the same parties who will be appearing at trial on the same factual and legal claims that were

at issue during the deposition. The answer must generally be no, except under the circumstances contemplated in *Wahlgren*.

In sum, the rules that govern the admissibility of deposition testimony are the same today as they were in 1984, when *Wahlgren* was decided. What Berroteran dismisses as a "so called 'conflict' " between the *Wahlgren* opinion and the *Berroteran* opinion (APFR 30) is a true conflict, one that can be resolved only by this Court's intervention.

B. *Wahlgren* does not conflict with this Court's more recent Evidence Code section 1291 precedent.

Contrary to Berroteran's suggestion, opinions of this Court since *Wahlgren* that affirm the use of former testimony at trial are entirely consistent with *Wahlgren*. (APFR 36-37, citing *People v. Williams* (2008) 43 Cal.4th 584, 626-627, *People v. Harris* (2005) 37 Cal.4th 310, 333, and *People v. Zapien* (1993) 4 Cal.4th 929.) The criminal cases did not involve deposition testimony at all, and none involved taking hearsay testimony from one case and introducing it in a later case. They raised the question whether a hostile witness's testimony at the preliminary hearing stage of a criminal proceeding could be introduced against the defendant at the subsequent trial *in the same case*. Unlike depositions, preliminary hearings determine whether there is sufficient evidence to bind the defendant over for trial. An adverse finding may result in the defendant remaining in jail. In that context, the Court's conclusion that those defendants had a motive to discredit

the hostile witness makes sense. But a defendant in a civil case has no similar motive to discredit a *friendly* witness, so the Court of Appeal's conclusion here that there is an inherent motive to cross-examine one's own employees or former employees who are being deposed by the other side makes no sense. Berroteran's cases thus show, by contrast with the criminal cases he cites, that *Wahlgren* continues to state the correct rule for the highly limited circumstances that may motivate cross-examination of a friendly witness outside the context of trial testimony.

C. The Federal Rules of Evidence provide no support for the broad interpretation of Evidence Code section 1291's hearsay exception adopted by the Court of Appeal here.

Berroteran's reliance on Federal Rules of Evidence, rule 804(b)(1) as supporting the Court of Appeal's rationale is misplaced. Berroteran overlooks the material differences between that rule and Evidence Code section 1291. (See APFR 25-26, 33.) The federal rule specifically provides that former testimony "at a trial, hearing, or lawful *deposition*" is admissible [in a later proceeding] if the person against whom it is offered had an "opportunity and similar motive" to cross-examine the witness. (Fed. Rules Evid., rule 804(b)(1), 28 U.S.C., emphasis added.) Section 1291 applies to "former testimony," and while former testimony *can* include deposition testimony, the legislative history made clear that sort of testimony rarely should be deemed to have been subject to the same kind of cross-examination one would

engage in at trial. (Assem. Com. on Judiciary, com. 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291.)

Berroteran offers no indication that, in federal court, lawyers are in fact routinely cross-examining friendly witnesses, as the Court of Appeal here says should be done under California law. Again, that is not what happens in the real world. The new paradigm set up by the Court of Appeal is based on a misconception about what actually does and should take place in state *or* federal court when lawyers use a discovery tool that is, first and foremost, supposed to apprise parties of facts relevant to the case in which the deposition was taken—not to serve as a substitute for eliciting testimony at trial, nor as a substitute for conducting case-specific discovery in future cases.

Berroteran reasons that defendants have a motive to cross-examine witnesses during depositions any time there is a risk the witness will be unavailable at trial. (Typed opn. 23, 25-26.) As a practical matter, this presumption would arise in every case, because one never knows what accident might befall a witness (there was no reason in this case for Ford to expect its designated witnesses to become unavailable). Under federal law, no such presumption arises. On the contrary, 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*." (*United States v. Salerno* (1992) 505 U.S. 317, 326 [112 S.Ct. 2503, 120 L.Ed.2d 255], emphasis added and omitted; *United States v. Feldman* (7th Cir. 1985) 761 F.2d 380, 385 [setting forth four-part factual inquiry to determine whether the proponent of the evidence

has proved there was a sufficiently similar motive to cross-examine at prior proceeding], abrogated on other grounds by *United States v. Rojas-Contreras* (1985) 474 U.S. 231, 232, fn. 1 [106 S.Ct. 555, 88 L.Ed.2d 537.) For example, if cross-examination questions about an issue would largely have been unnecessary for the nonnoticing counsel to address at the earlier proceeding, rather than at trial, the deposition testimony will not be admitted in the later proceeding. (2 McCormick on Evidence (7th ed. 2013) § 302.)

In other words, context matters. For example, in a case where a legal element was not in dispute—say, the parties did not contest that that particular plaintiff's engine had a manufacturing defect—counsel would not have a motive to cross-examine a witness to clarify or expand on her statements about the manufacturing process, quality control procedures, or defect statistics. It would be a waste of precious deposition time (not to mention prejudicial to opposing counsel who noticed the deposition, and who needs to use that time to develop facts relevant to the case at hand) to run down the clock picking at nits that might someday become relevant in a not-yet-filed case.

Or here, for example, the 2009 hearsay deposition testimony at issue arose in the context of a class action filed in Illinois, which alleged defects in more than one million engines sold to class members between 2003 and 2007. Deponents were asked questions about the performance of the engine during this entire time span. Given that procedural and factual context, Ford had no reason to cross-examine witnesses about details such as

distinctions in the performance of the engine from one model year to the next. In the unlikely event that the class action ever went to trial, Ford could examine its witnesses in more detail then, based on how the case had proceeded, and what evidence the plaintiff had presented.

In Berroteran's suit, by contrast, the question whether the engine improved over the years, as Ford alleges, is critical, because Berroteran purchased his vehicle in 2006, toward the end of the production run. By ignoring the context of the class action depositions, the Court of Appeal's opinion allows Berroteran to voluntarily forgo doing pertinent discovery for his own case, and then use hearsay evidence from out-of-state proceedings years earlier to prove facts that were not at issue in the class action itself. This would not happen in federal court, given the very different contexts between the Illinois class action and the individual California case now before the court.

Finally, even if *Berroteran* went no further than federal law, as Berroteran maintains, it would still represent a revolution in California law if federal law were as *Berroteran* represents. Section 1291 was not drafted with the intention of allowing hearsay deposition testimony from prior depositions to be freely admitted in later trials.

CONCLUSION

For the reasons explained above, this Court should grant Ford's petition for review.

January 9, 2020

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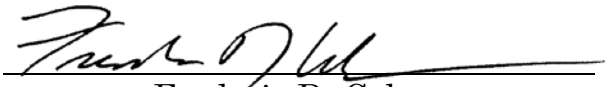
By: 
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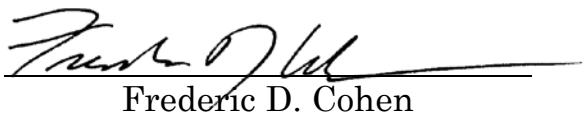

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Berroteran v. The Superior Court of Los Angeles County
Case No. S259522

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

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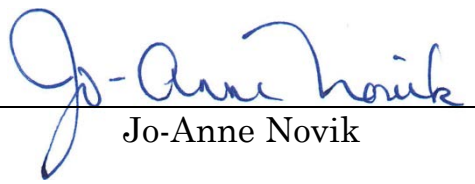

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STATE OF CALIFORNIA
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