Supreme Court Copy

S158965

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN REID
Plaintiff and Appellant

v.

GOOGLE INC.
Defendant and Respondent

AFTER DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CIVIL NO. H029602

APPEAL FROM THE SUPERIOR COURT OF THE
COUNTY OF SANTA CLARA
THE HONORABLE WILLIAM J. ELFVING, JUDGE
CIVIL CASE NO. CV023646

REPLY IN SUPPORT OF GOOGLE INC.'S PETITION FOR REVIEW

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I.

INTRODUCTION

Appellant Brian Reid's Answer fails to address the ultimate question concerning any petition for review. He essentially argues that review should be denied because the Court of Appeal's published opinion on which review is sought (the "Opinion") was rightly decided. Reid misses the point. On a petition for review, the question is not whether the Opinion was correct, but whether it conflicts with other Court of Appeal decisions, thus disrupting "uniformity of decision among the appellate courts," or whether the issue raised concerns "an important question of law." (Cal. Rules of Court ("CRC"), Rule 8.500(b).)

The Opinion conflicts with at least three other Districts in its unambiguous rejection of the well-established stray remarks doctrine, and pours fuel on the fire of the raging debate concerning treatment of evidentiary objections by trial and appellate courts throughout California by introducing yet another proposed solution to the intractable dilemma under *Biljac Assoc. v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 (*Biljac*). Until this Court offers its imprimatur on these important issues, confusion and uncertainty will continue among the state's appellate courts, trial courts, employers, and litigants. Thus, the Opinion is ripe for review.

II.

LEGAL ANALYSIS

A. Reid's Answer Underscores The Need For This Court To Grant Review To Establish Uniformity Of Decision Regarding The Stray Remarks Doctrine In California.

1. Post-*Reeves*, The Stray Remarks Doctrine Is A Viable, Enduring, And Useful Doctrine Often Invoked By Employers And Courts To Dispose Of Meritless Lawsuits On Summary Judgment.

Reid, not Google, entirely misrepresents the current state of the stray remarks doctrine, essentially claiming that this viable, breathing legal doctrine is dead after the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod., Inc.* (2000) 530 U.S. 133 *(Reeves)*. (Reid's Answer to Google's Petition for Review ("Answer") at p. 11.) To reach this remarkable conclusion, Reid turns a blind eye, as he must, to the California and federal post-*Reeves* cases cited in Google's Petition, all of which he fails to address. In fact, Reid's cited authority, both before and after the United States Supreme Court's decision in *Reeves*, bolsters Google's argument that the Opinion is an outlier conflicting directly with appellate decisions supporting the doctrine in the First, Second, and Fourth Districts. Nothing in Reid's Answer contradicts the reality that the Sixth District's rejection of the stray remarks doctrine raises an important issue of law and creates a conflict among California's appellate courts.

Reid conveniently ignores the California cases cited in the Petition applying the stray remarks doctrine, and then claims disingenuously that "no California case

recognizes a 'stray remarks doctrine' or 'rule, as such.'" (Answer at p. 12, fn. 7.) He does so despite the fact that Google's Petition cites to two post-*Reeves* stray remarks cases in California: *Gibbs v. Consol. Serv.* (2d Dist. 2003) 111 Cal.App.4th 794, review denied (*Gibbs*), and *Slatkin v. Univ. of Redlands* (4th Dist. 2001) 88 Cal.App.4th 1147 (*Slatkin*). (See Petition at pp. 11-12.) Reid does not merely overstate his case - he is simply dead wrong, as scores of published and unpublished cases demonstrate the recognition of the stray remarks doctrine in California. (See, e.g., *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809; *Gibbs*, 111 Cal.App.4th at p. 801; *Sada v. Robert F. Kennedy Med. Ctr.* (2d Dist. 1997) 56 Cal.App.4th 138, 154, fn. 15, review denied and certified for partial publication; *Slatkin*, 88 Cal.App.4th at p. 1160; *Kelly v. Stamps.com, Inc.* (4th Dist. 2005) 135 Cal.App.4th 1088, 1096 (*Kelly*).)

In fact, Reid even cites to *Kelly*, a California case recognizing the stray remarks doctrine, where the court engaged in a stray remarks analysis and ultimately concluded that the remarks were not stray. (*Kelly, supra*, 135 Cal.App.4th 1088, 1096, 1100-1101.) Far from rejecting the doctrine, *Kelly* cites *Gibbs,* a stray remarks case, with approval, and reinforces that California courts continually use the doctrine to distinguish comments made in connection with potentially discriminatory employment decisions from irrelevant remarks. (*Id.* at p. 1101.)

Similarly, ignoring all of the federal post-*Reeves* cases cited in the Petition, Reid claims that the stray remarks doctrine no longer survives under federal law

after *Reeves*. (Answer at p. 13.) Reid fails to note that *Reeves* makes no mention of stray remarks; rather, it articulates the standard for summary judgment, which is entirely consistent with the stray remarks doctrine. (*Reeves, supra,* 530 U.S. at pp. 148-149; Petition at p. 10.) Indeed, contrary to Reid's dire predictions[1], the stray remarks doctrine is alive and well post-*Reeves*.[2]

2. The Comments Alleged By Reid Fall Squarely Within The Stray Remarks Doctrine.

Reid also attempts to demonstrate that the Opinion was rightly decided because the alleged remarks were not "stray." Reid's arguments are not only wrong, they entirely miss the point—and necessity—of this Petition regarding the stray remarks doctrine: to "secure uniformity" and "settle an important question of law" regarding use of the doctrine by California courts. (See CRC 8.500(b).)

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[1] Reid relies on a law review article for the proposition that the term "stray remarks doctrine" should be abolished. (Answer at p. 12, fn. 7.) The article, however, contradicts Reid's position: **"Most circuit courts have continued to apply the Stray Remarks Doctrine . . . in much the same way that they did prior to the *Reeves* decision."** (L. Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and The Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products* (2002) 55 Vand. L.Rev. 219, 252, emphasis added.)

[2] (See, e.g., *Modero v. Salt River Project* (9th Cir. 2005) 400 F.3d 1207, 1211 [affirming summary judgment in favor of employer where comments by non-decisionmakers were stray remarks]; *Rodriguez v. Boehringer Ingelheim Pharm., Inc.* (1st Cir. 2005) 425 F.3d 67, 81 [same]; *Keelan v. Majesco Software, Inc.* (5th Cir. 2005) 407 F.3d 332, 337 [same]; *Arraleh v. County of Ramsey* (8th Cir. 2006) 461 F.3d 967, 975-976 (*Arraleh*) [affirming summary judgment in favor of employer where ambiguous comments were stray remarks]; *Adelman-Reyes v. Saint Xavier Univ.* (7th Cir. 2007) 500 F.3d 662, 666-667 [affirming employer's summary judgment where supervisor's comment unrelated to the employment decision was a stray remark]; *Ramlet v. E.F. Johnson Co.* (8th Cir. 2007) 507 F.3d 1149, 1152-1153 [same].)

Notwithstanding Reid's apparent confusion, he argues that the Sixth District's abandonment of the stray remarks doctrine is immaterial because some of the alleged comments were made by supervisors, are unambiguous, or are related to Reid's termination. Although these three factors are analyzed when evaluating whether a comment is a "stray remark," Reid resorts to mixing and matching them in an attempt to impermissibly push the alleged comments outside the purview of the doctrine and to distract this Court's attention from the true issue presented regarding the viability of the doctrine itself, not its specific application. (Answer at pp. 7-11, 14-16.)

In nearly every jurisdiction in the country, the stray remarks doctrine filters out three types of comments from discrimination cases: (1) discriminatory remarks uttered by non-decisionmakers; (2) remarks by decisionmakers outside of the decisionmaking context; and (3) ambiguous remarks not clearly evincing discriminatory animus, which lack legal relevance even when uttered by decisionmakers. (See footnote 3, *supra*.)

Reid's Answer focuses on comments made by Hoelzle, arguing that Hoelzle participated in the decision to terminate his employment, and thus, any age-related comments he made cannot be "stray." (Answer at pp. 5-6.) Reid presents a classic red herring. Whether Hoelzle is a "decisionmaker" is of no import, because the comments he allegedly made that Reid was "slow," "sluggish," and "lethargic," and his challenge of Reid's ideas as "obsolete" and "old," are entirely ambiguous and simply bear no connection to Reid's age.

Comments by a decisionmaker that are not clearly age-related, but instead are ambiguous, fall solidly within the stray remarks doctrine. (See, e.g., *Arraleh,* 461 F.3d at p. 976.)

In addition, Reid argues that Hoelzle's and Rosing's comments are not "ambiguous" and "open to interpretation," as Google asserts.[3] (Answer at p. 10.) Reid claims that Hoelzle's and Rosing's alleged comments that Reid was "slow," "sluggish," "lethargic," and not a "cultural fit" fall outside the stray remarks doctrine because they are age-related if taken in the context of Hoelzle's other verbal comments. (*Id.* at pp. 4, 5, 10.) However, the "other verbal comments" to which Reid refers are Hoelzle's alleged comments that Reid's ideas are "obsolete," that Reid's ideas are "too old to matter," and Hoelzle's alleged belief that the Company needed to hire "cheaper" employees. (*Id.* at pp. 4, 10.) Hoelzle's comments about Reid's *ideas* can be interpreted in several different ways, and most likely refer to a failure by Reid to offer modernized work product in a rapidly changing technological landscape. The same statements could easily have been made about a younger employee's ideas based on previous designs. At a minimum, it is disingenuous to claim that these comments are not capable of more than one meaning, i.e., ambiguous. Moreover, Hoelzle's comments have no

[3] Reid attempts to distort the evidence by claiming that Hoelzle said that "Reid was . . . 'obsolete' [and] 'too old to matter.'" (Answer at p. 9.) Instead, as clearly set forth in the record, these comments by Hoelzle referred to Reid's *ideas* - not Reid himself. (Answer at p. 4.)

bearing on whether Rosing's alleged "cultural fit" comment is age-related. (See *id.* at pp. 5, 10.)

Reid's final argument posits that Rosing's and Hoelzle's alleged remarks are necessarily related to Reid's termination simply because the two employees were allegedly Reid's supervisors. (*Id.* at p. 1.) Even if true, Reid's argument is irrelevant because the statements were ambiguous and need not be uttered by a non-decisionmaker to constitute a "stray remark." (See *Arraleh, supra*, 461 F.3d at p. 976; footnote 3, *supra*.)

3. Extraneous Evidence Offered By Reid Is Immaterial To The Issues Presented By The Petition.

From yet another angle, Reid again attempts to circumvent the Opinion's evisceration of the stray remarks doctrine by reference to other evidence present in Reid's case beyond ambiguous and stray comments. Specifically, Reid argues that the Sixth District considered Reid's demotion, statistical evidence, and Google's alleged "changing rationales for Reid's termination" in rendering its decision to reverse the Superior Court's grant of summary judgment. (Answer at pp. 14-15.) Google will not, and should not, engage in an argument about the factual circumstances and merits of Reid's claim at this point, as Reid's citation to this evidence again misses the point of this Petition.

To be clear, Google has not attempted to fully address the merits of the stray remarks doctrine as applied to this case. The Sixth District's actions beyond its wholesale rejection of the stray remarks doctrine, including its consideration of

other proffered evidence (admissible or not), may be fully briefed by the parties upon this Court's grant of review. Until then, the other evidence proffered by Reid is immaterial to whether this Court should grant review and determine whether the stray remarks doctrine will continue as a viable legal doctrine in California.

B. Review Should Be Granted To Resolve The Considerable Debate Surrounding The *Biljac* Dilemma, Which Affects Virtually All California Litigants, Trial Courts, And Courts Of Appeal.

Reid's Answer does nothing more than underscore the generalized confusion and wide divergence of opinion surrounding the *Biljac* issue, solidifying the need for this Court to step in and provide the uniformity required by California's trial courts, Courts of Appeal, and litigants. Far from providing this Court with any reason to refrain from taking the *Biljac* issue framed in the Petition, the Answer demonstrates that review is absolutely necessary.

1. The Current State Of California Law Regarding *Biljac* Rulings Is Uncertain And Unsettled.

Reid has the audacity to suggest that there is no split in authority surrounding *Biljac* and its progeny.[4] He argues that, "[t]he Court of Appeal's analysis follows long-settled California rules of evidence" and claims it is

[4] "Experienced appellate practitioners" seeking "clear and consistent rules" in California appellate and trial courts clearly disagree with Reid's assessment. (See Amicus Curiae Letter by the California Academy of Appellate Lawyers (January 9, 2008) ["[Because of the unresolved *Biljac* issue] it is impossible for lawyers or judges to be sure they are following the proper course, or for appellate counsel to properly assess what happened in the trial court."].)

"questionable" whether a "lack of uniformity" among the Courts of Appeal even exists. (Answer at p. 17, 20, fn. 14, emphasis added.) Tellingly, the author of the Opinion, Justice Conrad Rushing, has been far more candid and accurate in his assessment of the deep fissures boiling between and among the Courts of Appeal on this issue:

> "I think it is time for the courts, or the Legislature if necessary, to drain the festering procedural swamp that has formed around the treatment of objections to evidence offered in support of and opposition to a motion for summary judgment."

(*Lawal v. 501(c) Ins. Programs, Inc.* (Cal.App. 6th Dist., Sept. 21, 2007, No. H029060) 2007 WL 2751782 at *35 (*Lawal*), emphasis added.)[5]

Choosing to ignore this simple truth, Reid questions "whether such a lack of uniformity in fact exists" because "[m]ost courts follow this Court's waiver analysis set forth in *Ann M.* and *Sharon P.*" (Answer at p. 20, fn. 14.) Once again, Justice Rushing's analysis is directly contrary: "Some courts have not been willing to go this far [finding waiver when the trial court issued a *Biljac* ruling], but in all cases the rule has generated a vast sea of confusion and controversy as courts try to decide what a party must do, beyond merely asserting an objection, to

[5] Google includes references to this unpublished Sixth District decision not to rely upon it, but to demonstrate the concerns about which the Petition seeks resolution. Although Google resisted the temptation to explore *Lawal* in its Petition, it cannot do so when Reid challenges the obvious lack of uniformity in this area, which is highlighted by *Lawal*. (See *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444 ["The message from the [California] Supreme Court seems to be that unpublished opinions may be cited if they are not 'relied on.'"].)

preserve it for appeal." (*Lawal*, *supra*, 2007 WL 2751782 at *35-36, emphasis in original.)

Indeed, the only common denominator among the Courts of Appeal facing a scenario like *Reid v. Google* is that they have all affirmed summary judgment, except the *Reid* Court. Beyond that, when Courts of Appeal face a trial court's *Biljac* ruling on evidentiary objections, they come up with almost every conceivable variation on how to treat those objections and the objected-to evidence.

In the **First District**, the Court of Appeal recently overturned *Biljac*, and now will generally consider all objections subject to a *Biljac* ruling waived. (*Demps v. San Francisco Housing Auth.* (2007) 149 Cal.App.4th 564, 579 (*Demps*).) However, the **First District** may ultimately follow the exception under *City of Long Beach v. Farmers & Merchs. Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784 (*Long Beach*), where objections are not waived, but are instead preserved for appellate review so long as the objecting party makes sufficient efforts to secure rulings on those objections (the amount of effort required for sufficiency is unclear). The **First District** side-stepped the *Long Beach* exception during its most recent opportunity, so whether the exception is viable in that district remains unclear. (*Ibid.*)

In the **Second District**, creator of the *Long Beach* exception, the Court of Appeal "may consider" objected-to evidence if the trial court does not expressly rule, but takes seriously its "responsibility in reviewing an order granting summary

judgment to independently determine the effect of the evidence submitted." (*Lincoln Fountain Villa Homeowners Ass'n v. State Farm Fire & Cas. Ins. Co.* (2006) 136 Cal.App.4th 999, 1010, fn. 4, emphasis added, citation omitted.) In the **Third District**, the Court of Appeal follows *Ann M. v. Pacific Plaza Shopping Ctr.* (1993) 6 Cal.4th 666 (*Ann M.*), holding that *Ann M.* "teaches that we must take this [*Biljac*] statement as an implied overruling of any objection not specifically sustained." (See *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 (*Laird*).) As such, the **Third District** "may not consider [the objecting party's] renewed objections to evidence" on appeal. (*Ibid.*, emphasis added.)

On the opposite end of the spectrum from the **Third District**, in the **Fourth District**, the Court of Appeal interpreted "the *Biljac* theory" to require that "the [objected-to] evidence was not admitted, and summary judgment should be upheld," thus reading the trial court's silence as sustaining the prevailing party's objections and affirming summary judgment for defendant. (See *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 241 (*Sambrano*) (citing *Biljac*, *supra*, 218 Cal.App.3d at p. 1410).) In the **Fifth District**, the Court of Appeal viewed the trial court's *Biljac* statement as "an implied overruling of any objection not specifically sustained," but did not reach the *Long Beach* exception. (See *Alexander v. Codemasters Group Ltd.* (2002) 104 Cal.App.4th 129, 140.)

Finally, in the **Sixth District**, the Court of Appeal presumed the admissibility of objected-to evidence, inferring that the trial court overruled the

objections and considered the evidence when granting summary judgment, even where the objecting party vigorously pursued its objections at the trial court level and on appeal (thus satisfying the *Long Beach* exception, at least in other appellate districts). (See *Reid v. Google, Inc.* (2007) 155 Cal.App.4th 1342, 1356.) Two weeks earlier, the **Sixth District** instead found it "incumbent on this court to address the key evidentiary issues presented," and to establish the scope of the admissible evidence in the record. (*Lawal, supra,* 2007 WL 2751782 at *10). In *Lawal*, the Court of Appeal carefully analyzed the actual objections to the evidence at-issue, and in doing so, affirmed summary judgment for the defendant. (*Ibid.*)

Based on the foregoing, litigants are left without clear guidance in navigating this procedural minefield, with hundreds of California court decisions producing countless interpretations, none so harsh in effect as the Opinion. Here, *Biljac* was good law in the First and Sixth Districts in September 2005, when Judge Elfving first granted summary judgment for Google.[6] Google filed its opposition to Reid's appeal and renewed its objections to Reid's evidence on July 28, 2006, again operating in a world where *Biljac* rulings were common and almost always upheld on appeal. The First Circuit did not overrule *Biljac* until it decided *Demps* almost one year later, on April 9, 2007, long after Google filed its opposition to Reid's appeal of the grant of summary judgment. Then, two weeks

[6] At a minimum, *Biljac* rulings "appear[] to be part of a long-standing practice in Santa Clara Superior Court." (*Lawal, supra,* 2007 WL 2751782 at *10.)

prior to the Opinion, the Sixth District truly considered and analyzed the objections of the prevailing party in *Lawal*, finding it "incumbent" upon the court to do so. In the Opinion, the Sixth District saw no such obligation, or need for any deference to the trial court's opinion whatsoever, instead presuming the admissibility of all of the evidence proffered by Reid. In doing so, the Opinion reversed Google's summary judgment victory based on flawed, inadmissible evidence that was clearly subject to Google's objections. Those objections may well have been considered by the trial court in granting the summary judgment in the first instance, but were not considered or analyzed by the Court of Appeal.

Because the Opinion represents the first time a Court of Appeal has reversed summary judgment under these circumstances, it has created a well-publicized "poster child" warning for litigants and trial courts regarding the dangers of a trial court's implicit, rather than express, ruling on evidentiary objections.[7] Simply put, this Opinion is a quintessential example of the uncertain state of the law and need for some level of predictability and uniformity of results. Thus, the Opinion is the perfect vehicle for this Court to finally hear and resolve this issue.

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[7] For Reid to contest Google's standing to raise this issue on the premise that Google "benefited" because of some dubious distinction between "waiver" and the Opinion's implied overruling of Google's objections, coupled with its presumed admissibility of Reid's evidence, makes little sense. Google's victorious summary judgment motion was reversed, thus sending all parties back to the trial court to try this case. To construe that prejudicial result as a "benefit" is an absurdity that requires no further discussion. (Answer at pp. 20-21.)

2. Courts Of Appeal Are Greatly Divided Regarding The Proper Appellate Role In Considering Objections To Evidence On *Biljac* Rulings.

Reid boldly proclaims that, "[t]o the extent Google is suggesting it is inappropriate for courts of appeal to address the merits of evidentiary objections, the contention is clearly without support. The courts of appeal address the merits of evidentiary objections **all the time**." (Answer at p. 19, emphasis added.) To the extent Reid is correct, that is precisely the problem. As Courts of Appeal, including the Sixth District, have lamented, the appellate stage is the wrong time and place to establish the parameters of the evidentiary record, as the trial court is better-suited to perform that judicial function. (See *Sambrano, supra,* 94 Cal.App.4th at p. 236 (citing *Long Beach*, *supra*, 81 Cal.App.4th at p. 780) [holding that preserving objections for appellate review under the *Long Beach* "approach seemingly transfers the evidentiary ruling job to the appellate court. This is not always a simple task, and not one suitable to this court, normally sitting as a three-judge panel committed to reviewing issues of law, not fact."]; *Lawal, supra,* 2007 WL 2751782 at *9 (citing *Sambrano, supra,* 94 Cal.App.4th at p. 236) ["I would require the trial court to rule on key evidentiary objections . . . [T]he *Biljac* approach effectively 'transfers the evidentiary ruling job to the appellate court,' which is not the best forum for that task."].)

Moreover, review of evidentiary objections by the Courts of Appeal is *only* necessary when the trial court has issued a *Biljac* ruling or the equivalent. Consistent with this Court's guidance in *Guz v. Bechtel Nat'l, Inc.* (2000) 24

Cal.4th 317, Reid's assessment that Courts of Appeal are required to address objections to evidence "all the time" is certainly not correct when a trial court expressly rules one way or the other. (See, e.g., *id.* at p. 334.) Specifically, a trial court may (1) expressly sustain objections, such that the Court of Appeal cannot consider the objected-to evidence or (2) expressly overrule objections, making clear that the evidence is admissible and was considered in the trial court's summary judgment ruling, and thus should be considered by the Court of Appeal. (*Ibid.*) The only time that a Court of Appeal has the opportunity to review evidentiary objections is when the trial court has not sustained or overruled them, but instead chose the now unstable middle ground created by *Biljac* and its progeny. Under the *Biljac* scenario, the trial court states that it has relied only on "competent and admissible evidence," in reaching its determination. (See Opinion at p. 1356.) With no clear direction as to which objections were sustained by the trial court and which were not, the various Courts of Appeal have employed different interpretations with widely varying results, including waiver of the objections, considering objections sustained, considering objections overruled, or remanding to the trial court for express rulings on those objections.

The next logical question that arises is the extent to which Courts of Appeal can or should consider objections to evidence when confronted with a *Biljac* ruling. Here, too, the courts are in disarray. A comparison of two cases within the Sixth District, the Opinion and the unpublished *Lawal* decision issued just two weeks prior, demonstrates the widely varying results for litigants. In this one

example, different results are caused by one panel of the Sixth District addressing a party's objections to evidence, while the other Sixth District panel, in the Opinion, simply addressed and accepted the evidence. In *Lawal*, the Sixth District first discussed (1) the critical judicial function of establishing the complete universe of admissible evidence on summary judgment and (2) that the Court of Appeal is "not the best forum for that task." (*Lawal, supra,* 2007 WL 2751782 at *10.) In more detail, the *Lawal* Court opined:

> As author of the lead opinion, I would require the trial court to rule on key evidentiary objections. I espouse this principle: "Part of the judicial function in assessing the merits of a summary judgment or adjudication motion involves a determination as to what evidence is admissible and [what] is not." (*City of Long Beach v. Farmers and Merchants* (2000) 81 Cal.App.4th 780, 784.) *Biljac* short-circuits that function. Moreover, the *Biljac* approach effectively "transfers the evidentiary ruling job to the appellate court," which is not the best forum for that task. (*Sambrano, supra,* 94 Cal.App.4th at p. 236.)
>
> I believe that it is incumbent on this court to address the key evidentiary issues presented below, in an effort to establish the parameters of the record before us.

(*Ibid.*) The *Lawal* Court then engaged in a painstaking and careful analysis specifically addressing "plaintiff's principal objections to the defense evidence here, beginning with her hearsay objections." (*Ibid.*) In doing so, the *Lawal* Court explored each of the primary objections – hearsay, personal knowledge, speculation, and lay opinion testimony – and studiously applied each of plaintiff's objections to the key evidence in that case. (*Id.* at *10-13.)

In stark contract, the Sixth District panel in *Reid* "infer[s]" that because the trial court relied on *Biljac* and no express ruling existed, the trial court must have "impliedly overruled [Google's objections to evidence], and considered the evidence when ruling on the summary judgment." (Opinion at p. 1358.) Given that, as described above, the rule at the appellate stage when a trial court has overruled objections is that the Court of Appeal must consider the evidence, it is no surprise that the Court immediately thereafter found Reid's dubious statistical evidence "clearly admissible," with no mention of any of Google's many objections.[8] The Court went on to discuss Google's "arguments" about "why the findings are not sound," but it is not clear whether the Court was addressing Google's legal arguments in its briefs or its objections to evidence. (*Id.* at p. 1359.) Also, if by "arguments" the Court meant "objections," then the Court mischaracterized Google's evidentiary objections, which addressed not only the soundness of the statistics, but also the evidentiary flaws in the purported "facts" set forth in Reid's expert report. (*Ibid.*) Even worse, the Court simply accepted all of Reid's evidence of stray remarks outright, making no pretense of mentioning, considering, or thinking about Google's objections to that evidence. By no means did the Sixth District find "incumbent" upon it the obligation to

[8] Google objected to Reid's expert's flawed regression analyses (which analyze performance rating and bonus, not termination--the ultimate adverse employment action alleged) on a number of grounds, including that the report was irrelevant, hearsay, unduly prejudicial, conclusory, vague and ambiguous, misleading, lacked personal knowledge, and constituted improper opinion testimony. (Appellant's Appendix at APP02796-2804.) None of these objections are mentioned in the Opinion.

establish the limits of the evidentiary record. Instead, the Opinion literally accepted all of Reid's proffered evidence, engaging in the absurd legal fiction of turning the trial court's stated reliance only on "admissible" evidence to a wholesale acceptance of all of the evidence. Based on this dangerous premise, which has profound implications for litigants and trial courts throughout California, the Sixth District reversed summary judgment.

3. The Sixth District's Opinion Has Significant Consequences For Litigants Throughout California.

Under the Opinion, even if a party prevails on a summary judgment motion, and even if that same party vigorously raised its objections to inadmissible evidence at every possible turn, if the trial court issues a *Biljac* ruling, then the prevailing party must appeal its own evidentiary objections, in the event that the Court of Appeal decides to rely on flawed, objected-to evidence in its review.

Every single case filed in California may be subject to similarly absurd results, and, if history and the great variety of current judicial precedent is any indication, each Court of Appeal may reach a different result, with litigants as the inevitable recipients of varied results on similar facts even before the same Court. The time has come to drain the "festering procedural swamp" surrounding the *Biljac* issue, and to instead create clear, bright lines for litigants, trial courts, and the Courts of Appeal to follow.

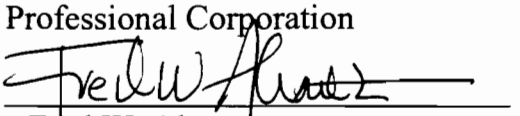
C. CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Petition, Google respectfully requests this Court's review of these important and highly disputed questions of law.

DATED: January 14, 2008

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



Fred W. Alvarez
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.504(d)(1)

The text of this brief consists of 4,191 words (including footnotes), as counted by the Microsoft Word 2003 word-processing program used to generate it.

Respectfully submitted,

Dated: January 14, 2008

By: _____
Fred W. Alvarez

CERTIFICATE OF SERVICE

I, Nancy Munroe, declare:

I am employed in Santa Clara County, State of California. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

On this date, I served:

REPLY IN SUPPORT OF GOOGLE INC.'S PETITION FOR REVIEW

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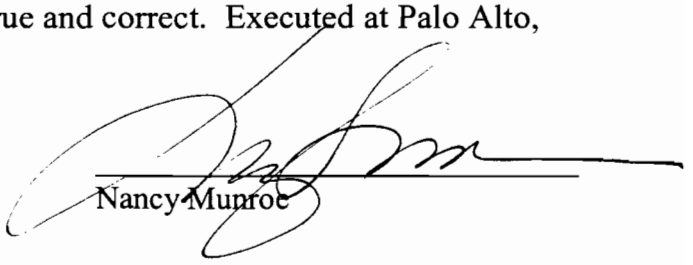
The Honorable William J. Elfving Judge of the Superior Court Santa Clara County Superior Court 191 North First Street San Jose, CA 95113	1 Copy

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on January 14, 2008.



Nancy Munroe