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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

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

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ISSUE PRESENTED

Counsel attending an opponent's deposition of a witness *aligned with counsel's own client* generally does not cross-examine that witness, because there are seldom advantages to doing so and there are strong strategic reasons not to undermine the witness or telegraph trial strategies during discovery. The question presented here is whether trial courts must nonetheless assume that counsel *did* have a motive to cross-examine friendly witnesses at every deposition, creating a presumption that the deposition testimony may be admitted as *trial testimony* not only in the case in which it was taken, but also in future cases against the same

party under a statutory exception to the hearsay rule that would otherwise bar such testimony.

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

This case involves an express conflict between two published Court of Appeal opinions concerning the proper interpretation of Evidence Code section 1291 (section 1291). Subdivision (a)(2) of the statute provides that hearsay testimony from one case is admissible as trial testimony in a later case under an exception to the hearsay rule only where the party against whom the testimony is offered "had the right and opportunity to *cross-examine* the declarant [in the earlier proceeding] with an *interest and motive similar to that which he has at the* [*later*] *hearing*." (Emphasis added.)

In *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, 546-547 (*Wahlgren*), the Court of Appeal held that *deposition* testimony of a declarant aligned with the party against whom it is offered usually does not satisfy section 1291's twin requirements of similar motive and interest to cross-examine the witness. "[A] deposition hearing normally functions as a discovery device" and a party defending a deposition of its own employees or other aligned witnesses has little reason to participate in the process by engaging in cross-examination. (*Id.* at p. 546.) Indeed, the court recognized there are sound reasons *not* to undertake cross-examination during a deposition. (*Ibid.*) Not only would it unduly lengthen depositions (prompting redirect, recross, and so forth), it

also would put counsel defending the witness in the position of prematurely revealing their litigation strategy. "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." (*Id.* at pp. 546-547.) The court accordingly held that the trial court properly excluded deposition testimony taken in a prior action where there was no evidence suggesting a motive to cross-examine the witnesses at those depositions. (*Id.* at p. 547.)

Wahlgren's reasoning tracks the legislative history of section 1291, which expressly contemplates that the statute will generally apply when prior *trial* testimony is introduced in place of live testimony in a subsequent proceeding, but not to *deposition* testimony of declarants aligned with the party who is raising the hearsay objection. (Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291, p. 87 [noting deposition testimony from a prior case "should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case"].) The holding is also consistent with the ordinary understanding of the nature of cross-examination and the fact that depositions are generally discovery devices. Unlike direct examination, which is designed to supplement or elaborate on a witness's recollections and opinions, cross-examination is meant to challenge the witness, such as by

undermining the witness's credibility or competence. This is not something a lawyer would reasonably do during a deposition of a "friendly" witness. Nor, as a general matter, does the lawyer defending a deposition have any incentive to expand upon the answers provided by the witness; indeed, it would likely violate a lawyer's duty to their client if they were to examine the witness at the end of a deposition and reveal information that opposing counsel failed to elicit.

Despite the recognized, and logical, reasons why counsel would rarely cross-examine a witness at a deposition, the Court of Appeal here reached the opposite conclusion. The first sentence of the *Berroteran* opinion reads, "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, fn. omitted.)

The court's disagreement with *Wahlgren* stemmed from a fundamentally different view about the role depositions play in litigation. The court in *Berroteran* held that *Wahlgren*'s view that depositions are at bottom discovery devices was "outdated given the prevalence of videotaped deposition testimony in modern trial practice." (Typed opn. 23.) The court noted the theoretical possibility that deposed witnesses may die or for other reasons become unavailable to give live trial testimony *in the same case* for which they were deposed, so counsel defending a witness during an opponent's examination must be presumed always to have a motive to examine every deposition witness—even one aligned with counsel's own client—on the assumption that both sides

might need to use the deposition to replace live testimony at the trial in the case for which the witness was deposed. (*Ibid.*; see Code Civ. Proc., § 2025.620, subd. (c)(2)(D) [deposition of unavailable witness admissible at the trial in which the deposition occurred].)

From that premise, the court concluded that depositions from an earlier nation-wide class action against Ford venued in an Illinois district court was admissible as trial testimony in this individual case against Ford, because Ford's class action counsel necessarily had a motive during the precertification stage of the class action to cross-examine its own employees in the event the class action went to trial and the employees became unavailable to Ford to testify live. (Typed opn. 22; see PWM 21.) Given that hypothetical motive, the court held the deposition testimony was admissible in any future case that raises similar issues—including in this California case filed by Raul Berroteran well after the class action was settled. (Typed opn. 25.) In doing so, the court did not defer to the trial court's determination that there was either no similarity of motive *or* similarity of interest in cross-examination between the earlier class action and the instant individual action.

The conflict between *Wahlgren* and *Berroteran* is stark and is a compelling ground for review. (Cal. Rules of Court, rule 8.500(b)(1).) But it is not the only ground. If *Berroteran*'s interpretation of section 1291 is correct, it will fundamentally change the way depositions are conducted in class actions and other cases arising out of facts that can give rise to repeat, similar claims against the same defendant. Depositions are not mini-

trials during which both sides' counsel go back and forth to tease out their entire theory of the case. They are instead a method for the deposing party to learn facts unknown to it—facts that may or may not later be elicited by either side at trial through live testimony and documentary evidence. (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 299 [the Discovery Act was enacted to provide tools " 'to expedite litigation; . . . to safeguard against surprise; . . . to prevent delay; . . . to simplify and narrow the issues; and, . . . to expedite and facilitate both preparation and trial,' " quoting *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376, superseded by statute on another ground as stated in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 491-492]; *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 180 [discovery provides a " ' "simple, convenient, and inexpensive" ' means of revealing the truth and exposing false claims"].) Until now, a lawyer defending—or simply attending—a deposition of a friendly witness has not had to imagine every possible question that *might* arise in a future action against their client and cross-examine that friendly witness "just in case."

Berroteran will undermine the deposition as a simple and inexpensive discovery device. If hearsay deposition testimony from one case can routinely be introduced as trial testimony in later cases filed by different plaintiffs, defense counsel will be forced to put on their whole case at the discovery stage rather than at trial. And counsel will have to explore not only facts about the particular case at hand, but also those that *might* become relevant in future cases where the deposition may be used against their

client. Doing so may undermine the client's interests in a variety of ways, notwithstanding the *Berroteran* court's belief that counsel have an inherent motive to take these steps. The simple fact that parties more frequently videotape their depositions cannot overcome the fundamental purpose of the hearsay rule: to exclude out-of-court statements that are impossible for the opposing party to *test* with cross-examination.

Wahlgren was correct when it held that depositions are principally discovery devices that will rarely overcome the hearsay bar in section 1291. Allowing hearsay depositions from a prior case to be used in place of live testimony elicited in the later action, or in place of deposition testimony taken in the later action, will fundamentally change the nature of depositions and impose untenable burdens on defendants. This Court should grant review, resolve the conflict created by *Berroteran*, and endorse the interpretation of section 1291 adopted in *Wahlgren*.

STATEMENT OF THE CASE

A. Ford is sued in a 2011 class action in Illinois over alleged defects in diesel engines used in various vehicles between 2003 and 2007. After precertification discovery is conducted, the class action is settled.

In 2010, a class action was filed against Ford in the United Stated District Court for the Northern District of Illinois that alleged defects in the company's 6.0-liter diesel engine. (Vol. 1, exh. 8, p. 488.) In 2011, in the same district court, the pending class action was merged into a multidistrict nation-wide class action based on the same alleged defects. (*In re Navistar Diesel Engine Products Liability Litigation* (N.D.Ill., July 3, 2013, Case No. 11C2496 [MDL No. 2223]) 2013 WL 10545508 (*In re Navistar*) [nonpub. final order and judgment]; typed opn. 5.) The complaint in the multidistrict litigation alleged "there were defects in the 6.0-liter diesel engine that Ford installed in a range of pickup trucks, sports utility vehicles, vans, and ambulances between 2003 and 2007." (Typed opn. 5-6.) It alleged Ford knew about the problems but failed to disclose them to vehicle purchasers. (Typed opn. 6.) The complaint asserted no common law fraud claims, but asserted causes of action for breach of implied warranty, breach of express warranty, and violation of various state consumer protection laws. (Vol. 1, exh. 1, p. 11.)

During the precertification stage of the class action, plaintiffs' counsel deposed five Ford employees and former

employees in Michigan and Florida about the evolving design of the engine as used in various vehicles: Frank Ligon, Scott Eeley, John Koszewnik, Michael Frommann, and Mark Freeland. (Typed opn. 7; see vol. 1, exh. 9, pp. 792, 1150, 1231, 1827, 2119.) The questions focused principally on the period between 2002 and 2005, but often the questions were vague as to time. (See, e.g., vol. 1, exh. 9, pp. 1874, 1884-1885, 1892, 2171-2172, 2218, 2242.) Ford's class action counsel in attendance did not pose any questions to the witnesses. (PWM 26.)

After the precertification discovery, the parties settled the case in late 2012 or early 2013. (Typed opn. 6; vol. 1, exh. 4, p. 147.)

B. In his individual California action against Ford filed in 2013, Berroteran seeks to rely on video depositions taken during the class action discovery to prove his case. Relying on *Wahlgren*, the trial court excludes the class action deposition testimony as hearsay.

In 2006, Berroteran purchased a new 2006 Ford F-250 truck equipped with a 6.0-liter diesel engine. (Vol. 1, exh. 1, p. 13.) Berroteran alleges that when buying the truck, he relied on Ford's vague representations that the engine was " 'high-quality,' " " 'free from inherent defects,' " and was " ' "best-in-class." ' " (Typed opn. 4.) He alleges he suffered various breakdowns and had difficulty towing. (Vol. 1, exh. 1, p. 14.) Berroteran took the truck to a Ford authorized repair facility for repairs, but Berroteran claims none

of the repairs was effective. (Vol. 1, exh. 1, pp. 14-15; typed opn. 4.)

In 2013, Berroteran opted out of the *In re Navistar* class settlement so that he could pursue an individual state court action in California. (Vol. 1, exh. 1, pp. 25-26; typed opn. 6.) After driving the truck for more than seven years, he sued Ford. (See vol. 1, exh. 1, p. 27:23-27.) The operative complaint asserts claims for several types of common law fraud, violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and violation of California's "lemon law"—the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). (Vol. 1, exh. 1, p. 11; typed opn. 4-5.)

During pretrial designations, Berroteran indicated he planned to introduce excerpts from the video depositions of the five Ford employees taken years earlier in the class action discovery. (PWM 24-25, 37.) Berroteran also indicated he planned to introduce deposition testimony from three Ford employees (Scott Clark, Eric Gillanders, and Eric Kalis) taken in lawsuits against Ford by other individual vehicle owners, and the deposition testimony of Bob Fascetti taken in a class action that involved ambulances. (PWM 32-34, 37.)

Ford moved to exclude the deposition testimony on the ground it was inadmissible hearsay that did not fall within any exception to the hearsay rule. (Typed opn. 11.) Berroteran relied on the hearsay exception in section 1291 in arguing that the prior deposition testimony was admissible. Section 1291, subdivision (a)(2) provides that hearsay testimony from one case is admissible

in a later case if the party against whom the testimony is offered "had the right and opportunity to *cross-examine* the declarant [in the earlier proceeding] with an *interest and motive similar to that which he has at the* [*later*] *hearing*." (Emphasis added.) According to Berroteran, Ford had had the same motive and opportunity to "cross-examine" its employees and former employees during the 2011 and 2012 class action depositions in Illinois as Ford would have had if the testimony were elicited in this individual California case.[1]

Ford responded that *Wahlgren* was controlling on this issue. *Wahlgren* distinguished former trial testimony from former deposition testimony, holding that a party rarely has a motive to cross-examine its own witnesses at a deposition, so that prior deposition testimony from such witnesses generally is not admissible in later independent proceedings. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) *Wahlgren* explained that tactical considerations—for example, not exposing its defenses—fully justify a party's decision not to question a witness at a discovery deposition. (*Ibid*.) Other reasons to forego cross-examination at a deposition could include an understanding that the case is highly

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[1] Berroteran also argued the class action depositions were admissible under Code of Civil Procedure section 2025.620, subdivision (g), which creates an exception to the hearsay rule for depositions taken in a prior action between the same parties that involves the same subject matter. (Vol. 1, exh. 4, p. 150.) Ford disagreed. (Vol. 1, exh. 2, pp. 81-82.) Because it found the depositions admissible under Evidence Code section 1291, the Court of Appeal concluded it did not need to address whether the class action depositions might also be admissible under section 2025.620. (Typed opn. 14-15, fn. 8.)

unlikely to go to trial (as is true in the vast majority of class actions), or that the aligned witness has agreed to be available to testify in person, or that other discovery not yet completed will obviate the need for further examination of the witness. Citing *Wahlgren*, Ford argued Berroteran had not met his burden of proving the hearsay exception applies, noting that Ford " 'clearly did not have a similar interest and motive to examine its employees at those depositions as it will have at trial in this case. Indeed, it is not established that Ford's counsel undertook any re-direct examination at the depositions.' " (Typed opn. 12.)

Based on *Wahlgren*, the trial court granted Ford's motion to exclude the deposition testimony. (Typed opn. 15.) Berroteran filed a writ petition seeking reversal of that ruling. (*Ibid.*)

C. The Court of Appeal disagrees with *Wahlgren* and holds that the video depositions are admissible.

The Court of Appeal in *Berroteran* held, in express disagreement with *Wahlgren,* that a party *necessarily* has a motive to conduct cross-examination after opposing counsel has deposed a witness because it *theoretically* might become necessary to use the deposition *in the same case in which the deposition was taken.* (Typed opn. 22.) The court thus lifted the burden from the proponent of the hearsay evidence to demonstrate that the statutory exception to inadmissibility applies, and instead placed the burden on the party objecting to introduction of hearsay deposition testimony to rebut the court's presumption that there is

a motive to cross-examine aligned witnesses. (Typed opn. 25 ["Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions."].) And, contrary to *Wahlgren*, the court held that tactical considerations are irrelevant in analyzing whether a defendant had a motive to cross-examine its own witnesses at discovery depositions. (Typed opn. 19.) Under those circumstances, a defendant refrains from cross-examining witnesses at depositions—on both the issues presented in the instant case, and issues that *might* arise in a *future* case—at its peril.

Furthermore, because the Illinois nation-wide class action and prior individual suits raised some issues that overlapped with Berroteran's case, the Court of Appeal concluded that Ford must have had a sufficiently similar motive in those earlier matters "to *disprove* the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine." (Typed opn. 25, emphasis added.) The court held this was enough to grant to Berroteran the procedural shortcut of not conducting his own discovery, and instead relying on hearsay testimony from depositions conducted in the much earlier Illinois class action and other plaintiffs' individual actions. (See *ibid*.) The court overlooked the fact that allegations are not proved or disproved in discovery—they are disproved at trial, which is where the motivation to cross-examine comes into play. The Court of Appeal nevertheless held the trial court abused its discretion by granting Ford's motion to exclude the deposition testimony. (Typed opn. 27.)

LEGAL ARGUMENT

I. This Court should grant review to resolve the direct conflict between *Wahlgren* and *Berroteran* about the use of prior deposition testimony under Evidence Code section 1291's exception to the hearsay rule.

Hearsay evidence is inadmissible because "an out-of-court statement is not subject to *cross-examination* to test the *declarant's perception, memory and veracity* when the statement was made. Lacking the benefit of cross-examination . . . hearsay evidence is inherently *unreliable* as substantive proof." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2019) ¶ 8:1002, p. 8D-1.)

As the Court of Appeal held in *Target National Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1, 7, quoting *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585, " '[t]he essence of the hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination. [Citation.] The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination.' "

As previously noted, section 1291, subdivision (a)(2) creates an exception to the hearsay rule for out-of-court statements that have already been tested by cross-examination. If the party against whom the evidence is offered "had the right and opportunity to cross-examine the declarant with an interest and

motive similar to that which he has at the hearing," the earlier cross-examination is considered an adequate substitute for the party's inability to cross-examine the deponent at the later trial. (§ 1291, subd. (a)(2); see Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann. Evid. Code, *supra*, foll. § 1291, p. 87; *People v. Salas* (1976) 58 Cal.App.3d 460, 469.)

The Assembly Committee on Judiciary indicates that the Legislature believed the statute would principally be used to allow *trial* testimony from an earlier proceeding to be admitted in later proceedings. (See Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann Evid. Code, *supra*, foll. § 1291, p. 86 ["Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met"].) This makes sense: trial is where the party against whom the testimony is offered has every incentive to poke holes in the testimony, rehabilitate confusing testimony, and generally ensure that the testimony provides the full story.

Deposition testimony is a different story. As the Assembly Committee on Judiciary comment on section 1291 explains, the Legislature believed that *deposition* testimony generally would *not* be introduced in later proceedings because litigants have no reason to cross-examine deponents. (See Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann Evid. Code, *supra*, foll. § 1291, p. 87.) "[T]estimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness

to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case." (*Id*. at p. 87.)

In *Wahlgren, supra*, 151 Cal.App.3d at pages 546-547, the court echoed the Assembly Committee's conclusion that deposition testimony should be treated differently from trial testimony. "[G]iven the [deposition] hearing's limited purpose and utility, examination of one's own client is to be avoided. At best, such examination may clarify issues which could later be clarified without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense. [¶] In contrast, a trial serves to resolve any issues of liability. Accordingly, the interest and motive in cross-examination increases dramatically." (*Ibid*.) *Wahlgren* concluded the trial court in the case before it properly excluded the deposition testimony of defendant Coleco's officers in an earlier product liability case that involved the same alleged defect. (*Id*. at pp. 545, 547.)

In *Berroteran*, the court rejected *Wahlgren*'s conclusion and the Assembly Committee on Judiciary comment on section 1291 and suggested a party has a motive to prove or disprove its case *in discovery*: "Each deponent was represented by Ford's counsel, and Ford had the same interest to disprove allegations related to the 6.0-liter diesel engine" as it would have at trial. (Typed opn. 26.) In other words, the *Berroteran* court confused Ford's motive in *the case as a whole* with Ford's motive *during discovery depositions*—which occur while the parties are still acquiring the building blocks

of the case and trial strategies are still in flux. By conflating Ford's overall motive with its motive at individual depositions and assuming Ford had the burden of proving its case *at the deposition*, the court relieved Berroteran of the normal burden a proponent of hearsay evidence bears to prove that an exception to the hearsay rule applies. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 778 ["The proponent of hearsay . . . has the burden of laying the proper foundation"].) Instead, the court held that *Ford* had the burden of proving that the hearsay exception of section 1291 did *not* apply, and Ford failed to satisfy that burden. (Typed opn. 25 ["Ford made no showing that it lacked a similar motive to examine its [employees] during their depositions"].)

Wahlgren and *Berroteran* lead to opposite results. Under *Wahlgren*, courts should assume (as did the Legislature when enacting section 1291) that parties do not have a motive to cross-examine deposition witnesses—especially witnesses with whom those parties are aligned—unless the proponent of the hearsay can show otherwise. Under this view, deposition testimony from an earlier case would rarely be admissible in a later case. Under *Berroteran*, courts must assume parties *always* have a motive to cross-examine friendly witnesses during depositions to disprove the other side's contentions in that case—based solely on the speculative possibility that the witness becomes unavailable—and that the theoretical need to cross-examine witnesses in the earlier case *always* translates into a motive to cross-examine such witnesses with a view to use of the deposition as trial testimony in

future, as yet unfiled lawsuits. Review is necessary to decide which of these conflicting approaches is correct.

II. Unless this Court disapproves the *Berroteran* opinion, counsel will be compelled to dramatically expand the scope of examination in depositions in any case raising institutional issues—and still will be unfairly burdened by hearsay testimony as to which meaningful case-specific cross-examination did not and could not occur.

If *Berroteran* is correct that litigants necessarily have the same motive to cross-examine witnesses at depositions as they would have if the witness was called in a later trial raising related issues, it will fundamentally change the way depositions in class actions and similar proceedings are conducted. Under *Berroteran*, depositions in class actions will routinely be admissible as trial testimony in every opt-out case, because there will be at least some overlap between the class action claims and those of the former class member who opted out. The depositions from the earlier litigation will be admitted, without regard to whether the defendant had the opportunity or motive to cross-examine on the specific issues presented by the opt-out action—or to test whether the answers given about the class writ large are, in fact, germane to the narrower issues presented by the individual action. The same is true in cases where a witness is deposed in an individual product liability action about characteristics of the product that may be at issue in other plaintiffs' cases. The same is true where

a witness is deposed in an employment matter if the employer's practices may come up in future litigation by other employees. The same is true where a witness is deposed about a financial services defendant's business practices in a contract or tort matter that raises claims similar to those that other consumers may raise.

To avoid allowing juries in these later actions to hear only one (hearsay) side of the case, parties defending class actions, product liability suits, and every other case around the country that could result in future litigation in California against the same defendant will now be forced to cross-examine every deponent, not only about the issues in the case at hand but about every possible issue that could arise in future litigation. That is because counsel cannot predict whether a trial court will follow *Berroteran* or *Wahlgren*. Far from serving the goal of pretrial discovery to *streamline* litigation, depositions will take on the character of full blown trials—because, according to *Berroteran*, the defendant always has a motive "to disprove the allegations of misconduct" *at the discovery stage*. (See typed opn. 25.)

Even armed with the knowledge that a deposition could be admitted in a future case, defense counsel will be hard pressed to know what questions to ask during the cross-examination that the court in *Berroteran* contemplates. This case is a good example. In multi-district litigation consolidated into a nationwide class action in 2011, plaintiffs alleged defects in hundreds of thousands of 6.0-liter engines manufactured between 2003 and 2007. (Vol. 1, exh. 8, pp. 374, 444.) Depositions of Ford employees focused principally on problems that surfaced in the engine's early years.

(See, e.g., vol. 1, exh. 9, pp. 1874, 1884-1885, 1892, 2171-2172, 2218, 2242.) In the current litigation, Berroteran takes the position that those problems persisted into 2006. (Typed opn. 25-26, quoting vol. 1, exh. 1, p. 17.) Ford takes the opposite position. (Return 18.) Whether Berroteran is correct—whether the problems were never solved—*is the* critical issue in the current litigation. But when Ford's engineers were deposed in 2012, for a class action that was headed to settlement, Ford had no way of knowing that it needed to explore issues specific to Berroteran or to any of the other putative class members who might later file individual actions. As Ford's counsel explained, "it is hard to even articulate how somebody sitting in that deposition as a Ford counsel would come to the conclusion that, I better start asking merits-related issues in case a particular opt-out from one of these model years sues." (Vol. 1, exh. 7, p. 339.)

Berroteran argued he needed to use the depositions from the class action because the engineers deposed in the class action reside out of state and he could not call them as live witnesses. (Vol. 1, exh. 4, p. 153; PWM 12.) But nothing prevented Berroteran's attorneys from traveling to the states where the engineers live and deposing them *in this case*. Had he done so, there is no question the depositions would have been admissible. (Code Civ. Proc., § 2025.620, subd. (c)(2)(D).) Instead of engaging in that normal discovery procedure, Berroteran seeks to introduce untested hearsay testimony from depositions taken in 2011 and 2012 in separate out-of-state litigation involving other parties. Nothing in section 1291 permits a party to introduce untested

hearsay simply because they chose to forego taking depositions of key witnesses—depositions well within their ability to take.

Defendants should not be forced to disclose their defense theories at depositions called by plaintiff's counsel, and they should not be penalized in subsequent litigation if they fail to do so. They also should not be put in the position of guessing whether and how prior deposition testimony will subsequently be used in a California court. This Court should grant review and reaffirm the rule that depositions are fact-finding tools at which cross-examination seldom occurs, and not a substitute for trials from which hearsay testimony can regularly be imported into other cases.

CONCLUSION

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

December 9, 2019

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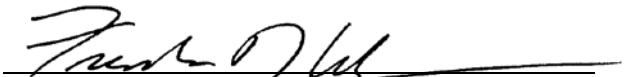
By: 
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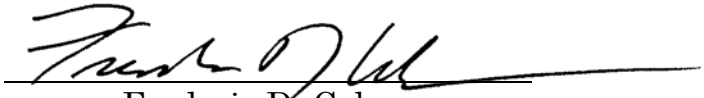
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 5,034 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: December 9, 2019



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COURT OF APPEAL OPINION
FILED ON 10/29/2019

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAUL BERROTERAN II, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FORD MOTOR COMPANY, Real Party in Interest.	B296639 (Los Angeles County Super. Ct. No. BC542525) OPINION AND ORDER GRANTING PETITION FOR WRIT OF MANDATE

ORIGINAL PROCEEDING; petition for writ of mandate. Gregory Keosian, Judge. Petition granted.

Knight Law Group, Steve B. Mikhov, Lauren A. Ungs; The Altman Law Group, Bryan C. Altman, Christopher J. Urner; Greines, Martin, Stein & Richland, Edward L. Xanders and Cynthia E. Tobisman for Petitioner.

Horvitz & Levy, Frederic D. Cohen, Lisa Perrochet, Allison W. Meredith; Sanders Roberts, Justin H. Sanders, Darth K. Vaughn, and Sabrina C. Narain for Real Party in Interest.

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)[1] of former testimony.

Here, the challenged former testimony is from nine unavailable witnesses, who previously were deposed in other state and federal litigation. The parties dispute whether real party in interest, Ford Motor Company (Ford), "had the right and opportunity to cross-examine the declarant *with an interest and motive similar to that which [it] has at the hearing*." (§ 1291, subd. (a)(2), italics added.) It is undisputed that petitioner Raul Berroteran II otherwise satisfied the statutory prerequisites for admission of the former testimony under section 1291.

We conclude Ford had the right and opportunity to cross-examine its employees and former employees with a similar motive and interest as it would have in the instant case. Each case, including the present one, concerns Ford's model 6.0-liter diesel engine, the engine's alleged deficiencies, Ford's alleged knowledge of those deficiencies, and Ford's strategy regarding repairing the engines. While a party's motive and interest to cross-examine may potentially differ when the prior questioning occurs in a pre-trial deposition, Ford failed to demonstrate any such different motive or interest here.

In reaching this conclusion, we disagree with *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*) to the extent it espouses a blanket proposition that a party has a different motive in examining a witness at a deposition than at trial. *Wahlgren* assumed that deposition testimony is limited to

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[1] Undesignated statutory citations to section 1291 refer to Evidence Code section 1291.

discovery and has a "limited purpose and utility." (*Id*. at p. 546.) 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.

We grant Berroteran's petition for writ of mandate and direct the trial court to enter a new order denying Ford's motion in limine excluding the videotaped deposition testimony of nine of Ford's employees and former employees. We also direct the trial court to reconsider the admissibility of documentary evidence that the trial court may have excluded because it found the depositions inadmissible.

BACKGROUND

This mandate proceeding challenges the trial court's grant of Ford's motion in limine to exclude the deposition testimony of the following Ford employees and former employees: Frank Ligon, Scott Eeley, John Koszewnik, Mike Frommann, Mark Freeland, Scott Clark, Eric Gillanders, Eric Kalis, and Robert (also referred to as Bob) Fascetti (motion in limine no. 30). Clark, Gillanders, and Kalis testified as Ford's persons most knowledgeable.

1. Operative Complaint in the Current Litigation

Berroteran's initial complaint is not included in our record. On May 22, 2014, Berroteran filed the operative pleading, the first amended complaint, alleging causes of action for multiple counts of fraud, negligent misrepresentation, violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), and violation of the Song-Beverly Consumer Warranty Act (*id*., § 1790 et seq.).

Berroteran alleged that on March 25, 2006, he purchased a new model Ford F-250 truck. The truck had a defective 6.0-liter diesel engine supplied by Navistar International Transportation Corporation (Navistar). When he purchased his Ford truck, Berroteran relied on Ford's representations that the engine was reliable and offered superior power. Prior to purchasing the vehicle, Berroteran read materials prepared by Ford stating that the engine was "high-quality" and "free from inherent defects," and was " 'best-in-class: horsepower, gas torque, unsurpassed diesel horsepower, best conventional towing, and best 5th wheel towing.' " Further, a salesperson assured Berroteran the engine was Ford's best.

Berroteran also alleged that while driving his truck, he experienced numerous breakdowns, "a blown turbo," and problems while towing. According to Berroteran, Ford's attempts at repairs did not remedy the problems despite Ford's representations that it had fixed the engine. Berroteran further alleged he was unable to use the truck for the purposes for which he purchased it.

In the operative complaint, Berroteran described Ford's purported deceptive repair history regarding his and other consumers' 6.0-liter Navistar diesel engines: "Ford: (a) rather than identifying and eliminating the root cause of these defects, produced and sold the vehicle to Plaintiff[ ] and other consumers, knowing it contained a defective engine; (b) adopted through its dealers a 'Band-Aid' strategy of offering minor, limited repair measures to customers who sought to have the defects remedied, a strategy that reduced Ford's warranty expenditures but did not resolve the underlying defects and, in fact, helped to conceal the defects until the applicable warranties expired; and (c)

intentionally and fraudulently concealed from Plaintiff . . . these inherent defects prior to the sale or any time thereafter. . . ." In Berroteran's words: "At all relevant times, Ford was aware of its inability to repair the defects in the 6.0-liter Navistar diesel engine."

2. Other Litigation Against Ford Related to the 6.0-Liter Diesel Engine

Like the current case, the prior litigations in which plaintiffs deposed Ford's employees and former employees involved allegations that Ford's 6.0-liter diesel engine was defective. We summarize below those prior litigations and the videotaped depositions that are at issue in the mandate proceeding before us.

a. MDL No. 2223 In re: Navistar 6.0L Diesel Engine Products Liability Litigation Federal Multidistrict Litigation[2]

Berroteran was a putative class member of the federal lawsuit *Burns v. Navistar Inc. and Ford Motor Company* filed in the Southern District of California. The case merged into a multidistrict class action against Ford related to the 6.0-liter diesel engine.

Ford accurately characterizes the operative complaint in the multidistrict litigation as alleging "there were defects in the 6.0-liter diesel engine that Ford installed in a range of pickup trucks, sports utility vehicles, vans, and ambulances between 2003 and 2007." Ford accurately states that like in the current

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[2] *In re: Navistar 6.0L Diesel Engine Products Liability Litigation (In re: Navistar)* [MDL No. 2223].

proceeding, the multidistrict litigation "deal[t] generally with alleged 6.0-liter engine problems." The operative complaint in the multidistrict litigation included a subclass of persons who purchased or leased vehicles in the state of California. That subclass alleged violations of California's Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.) and California's Unfair Competition Law (Bus. & Prof. Code, § 17200).

The 113-page operative complaint included the following allegations.[3] Ford marketed and sold vehicles equipped with Ford's 6.0-liter diesel engine. The 6.0-liter diesel engine was defectively designed and manufactured. "Ford knew from the outset that there were severe and pervasive design, manufacturing, and quality issues plaguing the Ford 6.0L Engines. Yet, despite this knowledge, Ford never disclosed any of these issues to consumers." Ford failed to authorize necessary major engine repairs during the warranty period, instead authorizing only inadequate repairs. Plaintiffs sought damages related to the cost to repair or replace the 6.0-liter diesel engine, and to the diminution in value as a result of the alleged defective engine.

The multidistrict litigation ultimately settled after Ford stipulated to class certification and agreed to the settlement. Berroteran opted out of the class action settlement. The deposition testimony Berroteran seeks to introduce was admitted

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[3] We grant Berroteran's request for judicial notice of Ford's answer to the operative complaint in the multidistrict litigation. The answer is relevant because it describes allegations in the federal complaint that were redacted from that complaint. The answer, filed in federal court, is subject to judicial notice. (Evid. Code, § 452, subd. (d).)

in four lawsuits by other putative plaintiffs who also had opted out of the settlement in the multidistrict litigation.

In the context of the multidistrict litigation, the following Ford employees and former employees were deposed: Frank Ligon, Scott Eeley, John Koszewnik, Mike Frommann, and Mark Freeland. Ligon, Freeland, and Koszewnik had retired from Ford before their depositions. Ford's counsel represented each deponent during the depositions.

At the time of his videotaped deposition, Eeley was employed at Ford as a supervisor for computer-aided engineering. In his deposition, Eeley testified regarding the 6.0-liter diesel engine, as well as Ford's position with respect to warranty issues involving the engine.

In a videotaped deposition, Koszewnik testified that he left his employment with Ford in 2006, after 29 years. Koszewnik had many positions at Ford and retired as a chief engineer for three gasoline engines. The deposition concerned the "6.0-liter engine that Ford made." In a videotaped deposition, Frommann testified that in 2006, he worked at Ford's customer service division as a warranty program manager. Plaintiffs' attorneys questioned Frommann about his knowledge of defects in Ford's 6.0-liter diesel engine.

At the time of his videotaped deposition, Ligon had retired from Ford as the director of service engineering operations. In preparation for his deposition, Ligon reviewed e-mails about the 6.0-liter diesel engine and met with Ford's counsel. Ligon testified about the 6.0-liter diesel engine and testified about e-mails related to the engine. Freeland also had retired before his videotaped deposition. Freeland had several positions at Ford, and prior to his retirement, worked in "engine research."

In his deposition, Freeland testified he understood his deposition concerned "the work [he] did in conjunction with [a] . . . failure analysis on injectors on the 6.0 diesel engine."

b. Brown, et al. v. Ford Motor Company (Superior Court of California; County of Butte)[4]

The operative complaint in *Brown* named Ford as a defendant and asserted the same causes of action as alleged in the current case. *Brown* arose out of the plaintiffs' purchase of a Ford truck with a 6.0-liter diesel engine supplied by Navistar. As in this case, the plaintiffs alleged that the 6.0-liter engine was defective. Further, as in this case, the plaintiffs described Ford's repair strategy for the 6.0-liter diesel engine: "Ford: (a) rather than identifying and eliminating the root cause of these defects, produced and sold the vehicle to Plaintiffs and other consumers, knowing it contained a defective engine; (b) adopted through its dealers a 'Band-Aid' strategy of offering minor, limited repair measures to customers who sought to have the defects remedied, a strategy that reduced Ford's warranty expenditures but did not resolve the underlying defects and, in fact, helped to conceal the defects until the applicable warranties expired; and (c) intentionally and fraudulently concealed from Plaintiffs . . . these inherent defects prior to the sale or any time thereafter. . . ."

Eric Kalis's videotaped deposition was taken in the *Brown* litigation. At that deposition, Kalis testified as Ford's person most knowledgeable on the repair rates for the 6.0-liter diesel engine and Ford's analysis of the root causes of the engine's problems. Kalis also testified as Ford's custodian of records.

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[4] *Brown, et al. v. Ford Motor Company* (Super. Ct. Butte County, No. 160060).

Kalis was an employee of Ford at the time of his deposition in Ford's automotive safety office's design analysis group. Kalis confirmed that numerous documents were true and correct copies of documents created in the ordinary course of business. Counsel for Ford stipulated that for purposes of the *Brown* litigation, the videotaped deposition could be used "for any purpose whatsoever . . . ."[5]

c. Preston, et al. v. Ford Motor Company (Superior Court of California, County of El Dorado)[6]

The operative complaint in *Preston* alleges the same causes of action against Ford as in the current litigation. This lawsuit also involved allegations of a defective 6.0-liter diesel engine supplied by Navistar. As in *Brown* and in the current litigation, the Prestons alleged: "Ford: (a) rather than identifying and eliminating the root cause of these defects, produced and sold the vehicle to Plaintiffs and other consumers, knowing it contained a defective engine; (b) adopted through its dealers a Band-Aid strategy of offering minor, limited repair measures to customers who sought to have the defects remedied, a strategy that reduced Ford's warranty expenditures but did not resolve the underlying defects and, in fact, helped to conceal the defects until the

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[5] Kalis's deposition also was taken in *Dokken v. Ford Motor Company*, a case filed in Superior Court in Sutter County. It is undisputed that *Dokken* involves the same claims as the current litigation. (*Dokken v. Ford Motor Co.* (Super. Ct. Sutter County, No. CVCS13-0001994).)

[6] *Preston, et al. v. Ford Motor Company* (Super. Ct. El Dorado County, No. SC20130071).

applicable warranties expired; and (c) intentionally and fraudulently concealed from Plaintiffs . . . these inherent defects prior to the sale or any time thereafter. . . ."

In connection with *Preston*, Eric Gillanders testified in a videotaped deposition as Ford's designated person most knowledgeable regarding Ford's policies and procedures for the reduction of warranty claim buybacks under California law from 2003 onward. Gillanders was Ford's global business process manager and former dealer operations manager. Gillanders also testified as a custodian of records. At the end of the deposition, one of Ford's attorney's questioned Gillanders. Among other things, Gillanders testified that his "testimony" regarding the categories on which he was the person most qualified would "be the same in any Ford lemon law case pending in California."

Scott Clark testified in a videotaped deposition regarding Ford's policies and procedures for warranty claim buybacks. Clark testified as Ford's designated person most knowledgeable regarding Ford's policies, standards and training from 2003 onward regarding California Lemon Law claims and California consumer complaints to the Better Business Bureau. Counsel for Ford requested that Ford produce Clark only once for all matters pending in the state of California concerning the 6.0-liter engine for which plaintiff's counsel was counsel of record. Clark had "oversight over the dispute resolution program, the consumer affairs team, and the California Lemon Law team," as well as a warranty assistance team. He understood that his deposition concerned matters related to California's lemon law and Ford's procedure in handling lemon law claims. At the end of the deposition, Ford's counsel asked Clark questions.

d. Williams A. Ambulance Inc., et al. v. Ford Motor Company (Federal District Court for the Eastern District of Texas)[7]

Bob Fascetti's videotaped deposition was taken in federal litigation in Texas. The operative complaint is not included in the record, but it is not disputed that the litigation involved Ford's 6.0-liter diesel engine. The parties dispute whether the complaint identified a specific cause of action for fraud.

In July 2008, at the time of his videotaped deposition, Fascetti was the director of gas and diesel engineering for Ford. Fascetti provided an affidavit on Ford's behalf in Ford's lawsuit against Navistar, the supplier of the 6.0-liter diesel engine. Fascetti testified in his deposition about the 6.0-liter diesel engine. He acknowledged that the repair rates were "very high." It had the highest repair rate "ever experienced by Ford for an engine in widespread production."

3. In the Current Litigation, Ford Files Motion in Limine Number 30 to Exclude Prior Testimony of Ford's Witnesses From the Other Litigation

In the trial court, Ford sought to exclude the videotaped depositions of Scott Clark, Bob Fascetti, Scott Eeley, Mark Freeland, Eric Gillanders, Mike Frommann, Eric Kalis, Frank Ligon, and John Koszewnik. Ford argued that the deposition testimony constituted hearsay, and no exception to the hearsay rule applied to allow admission of the deposition testimony.

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[7] *Williams A. Ambulance, Inc., et al. v. Ford Motor Company* (E.D. Tx., No. 1:06-CV-00776).

With respect to section 1291, Ford argued: "Ford clearly did not have a similar interest and motive to examine its employees at those depositions as it will have at trial in this case. Indeed, it is not established that Ford's counsel undertook any re-direct examination at the depositions. As a result, the deposition testimony of the Ford employees in the former cases is not admissible under [section] 1291[, subdivision] (a)(2), and the jury should not hear this testimony." Beyond these conclusory assertions, Ford offered no analysis, explanation, or support for its statements. Instead, Ford relied on *Wahlgren* in support of its motion in limine.

4. Opposition to Motion in Limine No. 30

Berroteran opposed the motion in limine no. 30. Berroteran argued that Ford "does not even describe the witnesses or testimony it seeks to exclude. . . ." (Underlining omitted.) According to Berroteran: "The deposition testimony . . . has been admitted in four jury trials in the past year, and has been submitted to countless Courts in connection with summary judgment motions, pretrial motions, discovery motions. . . ." "It is highly relevant, as it directly concerns the subject matter of this case. Ford and its army of lawyers had unlimited opportunities to prepare those 'Ford company witnesses' in advance of their testimony, had every opportunity to examine those witnesses during the depositions, and had the same or similar motive as Ford has in this case."

5. Motion in Limine No. 29 and Opposition

In its motion in limine no. 29, Ford sought to exclude several of Berroteran's trial exhibits that had been produced in the multidistrict litigation. Ford argued among other things:

"Without any sponsoring witnesses or context from individuals with personal knowledge of the events discussed in the documents, these documents are mere props in Plaintiffs' attorneys' conspiracy theory spectacle."

Berroteran opposed the motion, arguing among other things: "In arguing that the documents are hearsay, Ford ignores the fact that its own custodian of records Eric Kalis testified that they were Ford business records for purposes of California's hearsay exception. . . ."

6. Hearing on the Motions in Limine

At the hearing on Ford's motions in limine, counsel for Ford relied principally on *Wahlgren* to argue that Ford did not have a motive to cross-examine its own witnesses: "We need—not only an opportunity but a motive to cross-examine. The law—with the leading case being *Wahlgren*—is that you don't have that in discovery . . . nor would that make sense in a class action where the issues were limited to class issues over a span of model years in an uncertified class. It makes no sense." "How could we . . . possibly [have] had a motive to cross-examine in a class action involving different model years where the discovery was limited to class issues and not merits issues?" Counsel (incorrectly) argued that the deposition testimony was limited to certification issues such as commonality and typicality, "not merits issues."

Counsel for Berroteran's counter argument focused on the identity of the issues regarding the 6.0-liter engine in the current and former litigations and Ford's correlating motive to defend its witnesses because Ford knew the videotaped depositions could be used in other cases involving the same engine: "It is no surprise to Ford that the plaintiffs in the class action intended to

use these depositions in trials. First of all, that's the purpose of the discovery. They are not just exploring the claims. . . . So for 1291, Ford had a motive, the same motive that they have here. They're defending themselves in consumer actions revolving around the 6.0[-]liter engine. They had the opportunity. They had attorneys present."

The depositions convey "what Ford knew and when they knew it about problems with the 6.0[-]liter engine. So it is the same allegation. Here we're saying Ford had knowledge of these problems prior to the date of sale of this truck. That's what they alleged in the class action." Berroteran's counsel argued that Ford had the "same motivation . . . They want truthful testimony from their employees. [¶] If the employee said, we had the highest warranty rates and that wasn't true, certainly Ford would have a motivation to correct that testimony on the record, just like they would here."[8]

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[8] Berroteran's counsel also argued that the depositions taken in the multidistrict litigation were admissible under Code of Civil Procedure section 2025.620, subdivision (g), which provides in pertinent part: "When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties . . . , all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action." (Code Civ. Proc., § 2025.620, subd. (g).)

Berroteran advances the same argument pursuant to Code of Civil Procedure, section 2025.620 on appeal and also argues that the testimony from the persons most qualified is admissible as a party admission under Evidence Code section 1222. Because we conclude that the deposition testimony

7. Trial Court Findings

The trial court ruled in Ford's favor. The court's brief explanation was as follows: "My ruling would be to grant the motion in limine [no. 30] and exclude those deposition transcripts for the reasons argued. In terms of whether or not they are actual parties—and specifically on just the broadness of the other cases and lawsuits and specifics of our particular case and whether or not those cases address the specifics of our particular case—I just don't think they [do]. . . ." "[T]hey involve multiple issues that are not really at issue here." The court later stated, "I guess it comes down to whether or not the testimony—and this is trial testimony or deposition testimony?"

The trial court granted motion in limine no. 30, "excluding the videotape testimony." The court also granted motion in limine no. 29, excluding numerous exhibits referenced in the deposition testimony. The court stated that without the deposition testimony, no one would testify that the documents constituted Ford's business records.[9]

This court issued an alternative writ requiring the trial court either to vacate its ruling granting motion in limine no. 30 or in the alternative, to show cause why a peremptory writ of mandate ordering the trial court to vacate its ruling should not issue. The trial court indicated that it would not vacate its ruling.

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was admissible under section 1291, we need not address Berroteran's additional arguments.

[9] The trial court additionally stated that the exhibits constituted hearsay and could not be characterized as admissions.

STANDARD OF REVIEW

The Evidence Code defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless it falls within an exception, such as the one provided in section 1291. (Evid. Code, § 1200, subd. (b).)

"[A] trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception [citation] and '[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto . . . .' [Citation.] We review the trial court's conclusions regarding foundational facts for substantial evidence. [Citation.] We review the trial court's ultimate ruling for an abuse of discretion [citation] . . . ." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132.)

DISCUSSION

We begin with legal background necessary to assess the parties' arguments. We then explain why the trial court abused its discretion in excluding former deposition testimony of Ford's witnesses taken in federal and state litigation regarding Ford's 6.0-liter diesel engine, the same engine underlying Berroteran's lawsuit.

As set forth below, although *Wahlgren* arguably supported Ford's argument and the trial court's conclusion, we disagree with *Wahlgren*'s categorical bar to admitting deposition testimony under section 1291 based on the unexamined premise that a party's motive to examine its witnesses at deposition always differs from its motive to do so at trial. Our conclusion

that no such categorical bar exists is consistent with federal authority interpreting a similar provision in the Federal Rules of Evidence.

A. Both section 1291 and rule 804 of the Federal Rules of Evidence include a hearsay exception for former testimony.

California and federal exceptions to the hearsay rule for former testimony are similar. Section 1291, subdivision (a)(2) provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and *opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing*." (§ 1291, subd. (a)(2), italics added.)

Under federal law, testimony that "was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and [¶] is now offered against a party who had . . . *an opportunity and similar motive to develop it by direct, cross, or redirect examination*" is admissible as an exception to the hearsay rule. (Fed. Rules Evid., rule 804(b)(1), 28 U.S.C. (rule 804), italics added.) Rule 804 balances the risk of introducing out-of-court testimony against the risk of excluding critical evidence. (*Lloyd v. American Export Lines, Inc.* (1978) 580 F.2d 1179, 1185.)

Whereas section 1291 requires a "motive similar," rule 804 requires a "similar motive" to examine the witness as a prerequisite to admission of former testimony. Because rule 804 contains a similarly worded exception to the hearsay rule, federal

authority is instructive in interpreting and applying section 1291. (See *In re Joyner* (1989) 48 Cal.3d 487, 492; see also *People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 563 ["if the 'objectives and relevant wording' of a federal statute are similar to a state law, California courts 'often look to federal decisions' for assistance in interpreting this state's legislation"].) As our high court has explained: "In resolving questions of statutory construction, the decisions of other jurisdictions interpreting similarly worded statutes, although not controlling, can provide insight." (*In re Joyner*, at p. 492.)

Ford relies on *Smith v. Bayer Corp.* (2011) 564 U.S. 299 for the proposition that even if federal and state " 'procedural' " statutes are identically worded, a state and a federal court can interpret their respective statutes differently. (*Id.* at pp. 309–310.) The issue before the United States Supreme Court in *Smith* was whether the relitigation exception to the federal Anti-Injunction Act precluded a federal court's enjoining a West Virginia state court from considering a class certification motion after a federal court had denied class certification involving a different class representative. (*Id*. at p. 302.) It was in the course of deciding this issue that the United States Supreme Court observed West Virginia's high court had stated its "independence" from the federal court's interpretation of the Federal Rules of Civil Procedure, rule 23(b)(3), 28 U.S.C.A. governing class certification. We fail to discern the relevance of *Smith* to whether section 1291, subdivision (a)(2) and rule 804 should be read in pari materia.

B. Federal cases interpreting rule 804 require factual analysis comparing the motive in the former case to that of the current case. Similar, not identical motive, is required.

Federal cases considering rule 804's critical language—"similar motive"—require an analysis comparing the existing case with the one involving the former testimony. Existence of a similar motive depends on the similarity of the underlying issues and the context of the questioning. (*U.S. v. Salerno* (1992) 505 U.S. 317, 326 (conc. opn. of Blackmun, J.).) Whether the "questioner had a similar motive at both proceedings to show that the fact had been established (or disproved)" is relevant to assessing admissibility under rule 804. (*U.S. v. DiNapoli* (2d Cir. 1993) 8 F.3d 909, 912.)

Under rule 804, former deposition testimony is not categorically excluded based on an assumption that a motive to examine a witness differs during deposition and at trial. "[P]retrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony that might otherwise be unavailable for trial." (*Gill v. Westinghouse Elec. Corp.* (11th Cir. 1983) 714 F.2d 1105, 1107.) The relevant issue is not whether the party had a "tactical or strategic incentive" to question its witnesses. Instead the relevant question is whether the party had "an opportunity and similar motive to develop the testimony." (*U.S. v. Mann* (5th Cir. 1998) 161 F.3d 840, 861; *DeLuryea v. Winthrop Laboratories, Etc.* (8th Cir. 1983) 697 F.2d 222, 227 (*DeLuryea*) ["Opportunity and motivation to cross-examine are the important factors, not the actual extent of cross-examination]; *Murray v. Toyota Motor Distributors, Inc.* (9th Cir. 1982) 664 F.2d 1377, 1379.) "[A]s 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 v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506 (*Hendrix*); see also *Pearl v. Keystone Consol. Industries, Inc.* (1989) 884 F.2d 1047, 1052 [party who makes the decision not to cross-examine witness in deposition cannot complain that the failure to cross-examine renders the deposition inadmissible].)

Hendrix involved allegations from consolidated asbestos cases that the defendants failed to warn plaintiffs to avoid inhaling asbestos dust in the handling of insulation products. (*Hendrix*, *supra*, 776 F.2d at p. 1492.) On appeal, defendants argued that it was error to admit portions of Dr. Kenneth Smith's deposition testimony concerning his knowledge about the hazards of asbestos dust and his efforts to warn the officers of one of the defendants about those hazards. (*Id*. at p. 1504.) Smith, the former medical director of one defendant, had testified in deposition in a different case involving asbestos related injuries. (*Ibid*.)

Applying rule 804, the appellate court rejected the argument that the defendant, who previously employed Smith, did not have the same motive to examine its witness in a deposition as at trial. (*Hendrix*, *supra*, 776 F.2d at p. 1506.) It explained that pretrial depositions not only serve as discovery, but also preserve testimony that might be unavailable at trial. (*Ibid*.) Further, the plaintiffs in both cases were asbestosis victims seeking compensation for exposure to asbestos dust. (*Ibid*.)

DeLuryea applied rule 804 to hold that the former testimony in a deposition in a worker's compensation action was admissible in a products liability trial involving a pain killer that allegedly caused serious tissue damage at the injection site. The former testimony there was of plaintiff's psychiatrist, who testified in plaintiff's workers' compensation case that plaintiff was abusing the painkiller, and that he "took her off" the painkiller but feared she would not be "able to stay away" from the drug. (*DeLuryea*, *supra*, 697 F.2d at p. 226.) The appellate court held that the deposition testimony was admissible because the deponent's testimony concerned matters relevant to both actions, to wit, whether plaintiff's " 'misconduct' " caused her injuries, and that plaintiff had "a similar motive in the two actions in disproving the allegations of misconduct." (*Ibid*.) It followed that the plaintiff "had a similar motive for testing the credibility of the testimony on cross-examination." (*Id*. at pp. 226–227.)

C. Except for *Wahlgren*, California law is consistent with federal law.

Section 1291 provides " 'no magic test to determine similarity in interest and motive to cross-examine a declarant. Factors to be considered are matters such as the similarity of the party's position in the two cases, the purpose sought to be accomplished in the cross-examination, and whether under the circumstances a thorough cross-examination of declarant by the party would have been reasonably expected in the former proceeding.' " (*People v. Ogen* (1985) 168 Cal.App.3d 611, 617 [analyzing the admissibility of preliminary hearing testimony from a different proceeding]; *People v. Samayoa* (1997) 15 Cal.4th 795, 850 [comparing motive to cross-examine witness at the

preliminary hearing and during penalty phase of trial]; cf. *People v. Sanders* (1995) 11 Cal.4th 475, 525 [the People lacked a similar purpose in cross-examining witness at a suppression hearing as opposed to at trial].)

A party's "interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. [Citation.] The ' "motives need not be identical, only 'similar.' " ' " (*People v. Harris* (2005) 37 Cal.4th 310, 333.) Where the party had the same motive to discredit the witness and challenge the witness's credibility, the former testimony would be admissible under section 1291. (*People v. Harris*, at p. 333.) Whether evidence is admissible under section 1291, moreover, depends on whether the party against whom the former testimony is offered had a motive and opportunity for cross-examination, not whether counsel actually cross-examined the witness. (*People v. Williams* (2008) 43 Cal.4th 584, 626–627.)

In contrast to these cases, *Wahlgren* appears categorically to exclude deposition testimony from the section 1291 hearsay exception. In *Wahlgren*, the plaintiff filed a personal injury action against defendants. (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 545.) The plaintiff suffered an injury after diving from a slide into a swimming pool. (*Ibid.*) Plaintiff was unsuccessful at trial, and on appeal, argued that the trial court erred in excluding former deposition testimony of one of defendant's officers. (*Ibid.*) The testimony concerned the policy of placing labels on pools to alert users to the dangers of diving. (*Ibid.*)

Affirming the trial court's decision to exclude the evidence, in a sparse opinion, the appellate court held the evidence was inadmissible under section 1291, subdivision (a)(2) because the defendant did not have the opportunity to cross-examine the declarant with the interest and motive similar to the current case. (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 546.) As relevant here, *Wahlgren* states: "[I]t should be noted that a deposition hearing normally functions as a discovery device. All respected authorities, in fact, agree that given the hearing's limited purpose and utility, examination of one's own client is to be avoided. At best, such examination may clarify issues which could later be clarified without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense." (*Id.* at pp. 546–547.)

Wahlgren—a 1984 case—cites no support for its assertions that a deposition functions only as a discovery device. That assumption is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice. *Wahlgren* cites no authority for the proposition that examination of one's "client is to be avoided." (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546–547.) That blanket assumption appears inconsistent with the reality of often overlapping lawsuits in different jurisdictions and the prospect that an important witness could retire or otherwise become unavailable. *Wahlgren*'s analysis also conflicts with the plain language of section 1291, subdivision (a)(2), which, on its face is unqualified: The statute states that it applies to "[t]he former testimony" and is not limited to former "trial testimony." (§ 1291, subd. (a)(2).)[10]

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[10] Ford relies on a comment regarding section 1291 from the Assembly Committee on the Judiciary in the publisher's

D. The trial court abused its discretion in granting motion in limine no. 30.

In its motion in limine, Ford argued that it "clearly did not have a similar interest and motive to examine its employees at those depositions as it will have at trial in this case. Indeed, it is not established that Ford's counsel undertook any re-direct examination at the depositions." Ford offered no further explanation why its motive to examine any specific employee or former employee differed from its motive in the current case. Ford offered no analysis of the causes of action in the prior litigation generating the challenged depositions and did not argue that those causes of action were different from the current litigation. In essence, Ford's argument was that a party never has the same motivation to examine its own witnesses in a deposition as it has at trial, an argument (as demonstrated above) that is contrary to the weight of authority and modern litigation practice.

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editor's note that where "the deposition was taken for discovery purposes" and the party did not cross-examine its own witness to "avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. . . . the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive." (Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291, pp. 86–87.) Ford, however, did not proffer any evidence that there was any strategic reason for not cross-examining its witnesses at their depositions here. Absent such a record, we do not address whether this partial legislative history would dictate a different outcome upon a proper and different record.

As Berroteran argues, Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions, and the record demonstrates just the opposite. Ford had a similar motive to examine each of the nine deponents.[11] The videotaped deposition testimony from the former federal and state litigations was on the same issues Berroteran raises in his current lawsuit—whether the 6.0-liter engine was defective, Ford's knowledge of the alleged defect, and Ford's repair strategy. The deponents' testimony concerned matters relevant to the former and current actions. Ford had a similar motive to disprove the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine.

Gillanders' testimony exemplifies the similarity of the issues in this litigation and the former litigation. During his deposition, Gillanders testified that his testimony regarding the categories on which he was the person most qualified would "be the same in any Ford lemon law case pending in California." Because his testimony would be the same, Ford's motive to cross-examine him would be similar, if not the same.

Ford's additional arguments are unpersuasive. For example, Ford argues: "Ford had little or no motive in suits that involved engines produced over a five-year period to question witnesses about the engine that Berroteran purchased in 2006." Ford's argument ignores Berroteran's key allegation that: "Without remedying the defects [identified in 2002], Ford continued to equip subsequent model years of the[ ] F-250 truck, including the 2006 model, with the 6.0-liter engine. Regardless of

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[11] It is undisputed that "Ford had an unrestricted opportunity at these depositions [of the nine witnesses] to examine each witness."

tweaks made to the 6.0-liter engine by Ford during subsequent model years, these same defects to the engine persisted throughout Ford's production and sale of the trucks." Even if the multidistrict litigation spanned a greater time period, it included 2006, the year Berroteran purchased his vehicle, and included Berroteran as a putative plaintiff.

Ford also argues that it had no incentive to question its witnesses on "Berroteran's vehicle, his vehicle purchasing experience, or his vehicle repair experience—to question witnesses about the particular problems Berroteran claimed to have experienced with his 2006 truck." Taken to its logical conclusion, Ford's argument appears to assume an additional prerequisite to section 1291—the identity of the parties. Clearly, that assumption is inconsistent with the language in section 1291.

Ford fails to demonstrate that it lacked a similar motive to examine its witnesses in the former litigation. Each deponent was represented by Ford's counsel, and Ford had the same interest to disprove allegations related to the 6.0-liter diesel engine. (Compare *N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1396 [no similar interest where no defendant present at deposition had an interest in establishing the facts relevant to the current litigation].) Although each case involved a different plaintiff or additional plaintiffs, the gravamen of each lawsuit was the same or similar. The undisputable fact that every owner will have a different purchase and repair history does not negate Ford's similar motive in questioning its witnesses on the substantial overlapping allegations, specifically regarding the 6.0-liter diesel engine. To recap, section 1291 requires a similar, not an identical, motive.

In short, the record does not support the conclusion that Ford did not have a similar motive to cross-examine its own witnesses in the prior litigation. Even if the causes of action in the current and prior cases are not identical, the crux of the litigation is the same in each case. In the trial court, Ford inaccurately characterized the depositions as involving only discovery and only "class issues" such as "commonality, whether there's typicality." As summarized above, in fact, the former testimony concerned Ford's 6.0-liter diesel engine, policies and procedures for warranty claims, and the authentication of documents from a custodian of records. It is undisputed that the depositions have been admitted at trial in multiple cases, and thus did not serve only discovery purposes. For all these reasons, the trial court abused its discretion in granting Ford's motion to exclude the entire depositions of Ligon, Freeland, Frommann, Eeley, Koszewnik, Clark, Fascetti, Gillanders, and Kalis.[12]

E. In light of our conclusion that the deposition testimony is admissible, the trial court should reconsider whether the documents are admissible.

It appears that the trial court may have excluded many of Berroteran's proposed trial exhibits based on its exclusion of the deposition testimony (motion in limine no. 29). In light of this court's conclusion that the trial court erred in excluding the entirety of the former testimony of Ford's witnesses, it should reconsider the admissibility of the documentary evidence it excluded in response to Ford's motion in limine no. 29.

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[12] Our holding concerns the admissibility of the deposition testimony under section 1291. We express no opinion concerning whether the evidence is objectionable on other grounds.

DISPOSITION

The petition for writ of mandate is granted. The trial court is directed to vacate its orders granting Ford's motion in limine no. 30 and issue a new order denying Ford's motion to bar Berroteran from presenting the deposition testimony of the nine Ford witnesses—Ligon, Freeland, Frommann, Eeley, Koszewnik, Clark, Fascetti, Gillanders, and Kalis. The trial court is directed to vacate its order granting Ford's motion in limine no. 29 concerning documentary evidence and to reconsider that order in light of our ruling vacating the trial court's order regarding motion in limine no. 30. Berroteran is entitled to his costs in this proceeding.

CERTIFIED FOR PUBLICATION.

BENDIX, J.

We concur:

CHANEY, Acting P.J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

Berroteran v. The Superior Court of Los Angeles County
Court of Appeal Case No. B296639
Supreme Court Case No. S_____

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.

On December 9, 2019, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

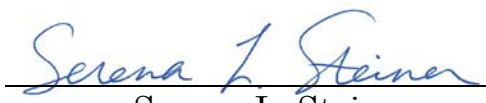
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 9, 2019, at Burbank, California.



Serena L. Steiner

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Berroteran v. The Superior Court of Los Angeles County
Court of Appeal Case No. B296639
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