CASE NO. _____

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ____

CAHILL CONSTRUCTION COMPANY, INC., erroneously sued as CAHILL CONSTRUCTION CO., INC. individually and as successor-in-interest to CAHILL BROTHERS; CAHILL CONTRACTORS, INC., erroneously sued as CAHILL CONTRACTORS, INC. individually and as successor-in-interest to CAHILL CONTRACTORS CO., INC.; FOSTER WHEELER LLC (fka FOSTER WHEELER CORPORATION); FRYER-KNOWLES, INC., A WASHINGTON CORPORATION; NIBCO INC.; O'REILLY AUTO ENTERPRISES, LLC f/k/a CSK AUTO, INC.; and SWINERTON BUILDERS,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,

Respondent,

EDWARD RICHARDS and LINDA RICHARDS,

Real Parties–in-Interest.

Petition from Alameda County Superior Court
Hon. Jo-Lynne Q. Lee and Hon. Michael Markman, Judges of the Superior Court
Departments 16 and 18 of the Alameda Superior Court; (510) 267-6934; (510) 267-6932
Alameda Superior Court Case No. RG21088294

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES
(SUPPORTING EXHIBITS FILED CONCURRENTLY HEREWITH)

Edward R. Hugo [SB No. 124839]
James C. Parker [SB No. 106149]
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cahill Construction Company, Inc., erroneously sued as Cahill Construction Co., Inc. individually and as successor-in-interest to Cahill Brothers;

Cahill Contractors, Inc., erroneously sued as Cahill Contractors, Inc. individually and as successor-in-interest to Cahill Contractors Co., Inc.;

Foster Wheeler LLC (fka Foster Wheeler Corporation);

Fryer-Knowles, Inc., A Washington Corporation;

Nibco Inc.;

O'Reilly Auto Enterprises, LLC f/k/a CSK Auto, Inc.; and

Swinerton Builders

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IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____

CAHILL CONSTRUCTION COMPANY, INC., erroneously sued as CAHILL CONSTRUCTION CO., INC. individually and as successor-in-interest to CAHILL BROTHERS; CAHILL CONTRACTORS, INC., erroneously sued as CAHILL CONTRACTORS, INC. individually and as successor-in-interest to CAHILL CONTRACTORS CO., INC.; FOSTER WHEELER LLC (fka FOSTER WHEELER CORPORATION); FRYER-KNOWLES, INC., A WASHINGTON CORPORATION; NIBCO INC.; O'REILLY AUTO ENTERPRISES, LLC f/k/a CSK AUTO, INC.; and SWINERTON BUILDERS,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,

Respondent,

EDWARD RICHARDS and LINDA RICHARDS,

Real Parties–in-Interest.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION, OR OTHER APPROPRIATE RELIEF

INTRODUCTION: WHY A WRIT SHOULD ISSUE

This petition seeks relief from a statute which expressly limits the number of hours that defense counsel can depose a mesothelioma plaintiff, while placing no time limit at all on the number of hours that the plaintiff's own counsel may depose the plaintiff, and purports to strip trial courts of their inherent and statutory authority to fashion protective orders and other remedies as justice requires.

The statute, Code of Civil Procedure section 2025.295 ("Section 2025.295"), became effective January 1, 2020 and has not been interpreted by any appellate court. Section 2025.295 sets an inviolable, "clear cap" on the hours available to defendants to

cross-examine a mesothelioma plaintiff and as such is unique not only in California's Discovery Act but in the federal courts and in all other State courts.

As Respondent Court expressed in certifying this matter for interlocutory appeal, "the question of the existence and extent of [a trial court's] discretion to depart from the cap on deposition time in Section 2025.295 is one where there are 'substantial grounds for difference of opinion.'" (Exhibit K to Supporting Exhibits, at p. 1503.) In fact, the statute has led to a conflict within Respondent Court in this case.

Petitioners have twice asked Respondent Court to expand the amount of time defendants are permitted to depose the plaintiff here, Edward Richards. The first motion was brought in April 2021 before the cross-examination portion of Mr. Richards' deposition began. Petitioners pointed out that Mr. Richards had sued over 100 defendants, had an extensive and complicated history to review, and that his own counsel had used some nine hours in direct examination. The Hon. Jo-Lynne Q. Lee agreed that Mr. Richards' health would not be harmed by having to sit for more hours of deposition by defendants, but that Section 2025.295 had "eliminated" all judicial discretion to allow defendants even a minute above the maximum time limit of 14 hours. The ruling meant that defendants were limited to an average of seven to eight minutes each to cross-examine Mr. Richards.

Petitioners sought relief from this Court, however Division Five denied the petition, finding that until the 14 hours were exhausted and a renewed motion for a protective brought to Respondent Court, Petitioners had not demonstrated the requisite irreparable harm.

After Mr. Richards' deposition was completed, and as anticipated by Division Five, Petitions renewed their motion for a protective order in Respondent Court. Because Judge Lee was unavailable the matter was assigned to the Hon. Michael Markman. In contrast to Judge Lee, Judge Markman concluded that the trial courts do have "very limited discretion"

based on Code of Civil Procedure Section 2025.420 ("Section 2025.420") to allow more time for defendants to examine a mesothelioma plaintiff above the maximum permitted by Section 2025.295, but he declined to exercise even that limited discretion to allow any extra time or any other remedy in this instance. Judge Markman's June 15, 2021 order acknowledges that while some may "credibly argue that Section 2025.295 takes away any and all discretion. The undersigned finds very limited discretion based on [S]ection 2025.240 [sic], but finds that the presence of a large number of defendants alone is insufficient to satisfy the requirements for exceeding the clear cap set by Section 2025.295. These questions are likely to recur in many future cases until the Court of Appeal can either (a) confirm that this Court's approach is the right one, (b) determine that Section 2025.295 eliminates all discretion, or else (c) set out guidelines concerning when (if ever) the simple aggregate number of defendants alone might permit a departure from the clear cap in Section 2025.295." (Exhibit K at p. 1503.)1

Petitioners now return to this Court for appellate relief. Their time to depose Mr. Richards' deposition has been exhausted and Respondent Court persists in refusing to offer any relief, even though Petitioners and the other defendants were permitted on average less than 10 minutes to depose Mr. Richards. Petitioners' pre-trial practical remedies are also exhausted. They and the 80 or so remaining defendants in this action have suffered, and will continue to suffer, irreparable harm caused by the constraints imposed by the application of Section 2025.295 unless this Court intervenes to provide relief. With the fast-approaching preference trial date of August 9, 2021, defendants have been deprived of the opportunity to adequately and effectively cross-examine the most important witness in this case, the plaintiff, and no other remedies exist to sufficiently alleviate this undeniable prejudice.

1 Judge Lee declined to certify the issue before the deposition had completed, explaining "certainly you can take it up on a writ, and I'm actually surprised it hasn't happened already. But this is an extreme situation where I guess there might be a reason that the Court of Appeal might want to take a look at it." (Exhibit L to Supporting Exhibits, Transcript, at 1533:22-1534:1.)

In addition, Respondent Court is not even certain if it could exercise any discretion, and if could what factors it should consider.

This issue is now ripe for appellate review. Does Section 2025.295 strip away all possible discretion from Respondent Court, no matter the number of defendants and the circumstances of the case and the conduct of the deposition, or does Respondent Court retain some discretion to allow defendants additional time to depose a mesothelioma plaintiff or to fashion some other remedy? If it retains discretion, what factors should Respondent Court consider beyond a plaintiff's health? We agree with Judge Markman that Section 2025.295 did not eliminate all judicial discretion and that the trial courts are not without the authority to order additional time or other remedies as the circumstances and common sense may require.

We suggest that Respondent Court should consider the following factors: (1) the number of defendants (here, over 100 were named and 80-90 attended Mr. Richards' deposition); (2) the types of defendants and the divisions among them (here there are manufacturers, suppliers, contractors and others); (3) the length and breadth of the plaintiff's exposure history (Mr. Richards claims exposures over a 30-year period); (4) the number of occupations and work sites at issue (here there are several dozen); (5) whether other discovery or evidence has become available prior to commencement of the deposition (here Petitioners had not been able to conduct written discovery prior to Mr. Richards' deposition); (6) if the deponent, another person or some other circumstance impedes the deposition (here, there were numerous speaking objections and Mr. Richards' tended to provide lengthy nonresponsive answers); and (7) if otherwise needed to fairly examine the deponent.

Defendants are now facing a trial less than 50 days from now. Appellate intervention is necessary to redress Respondent Court's failure to exercise any discretion or grant any protective order to avoid the undeniable inequity of Mr. Richards providing approximately

nine hours of direct testimony yet facing only minutes of cross-examination per active defendant. As Judge Markman has noted, the issues raised in this matter will recur. They should be addressed as soon as practicable. Immediate writ review is warranted. (See *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 108; *Pacific Tel & Tel Co. v. Superior Court* (1970) 2 Cal.3d 161, 169; *Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186.)

WHEREFORE, Petitioners pray that this Court:

1. Issue a peremptory writ of mandate and/or prohibition in the first instance, finding that Section 2025.295 does not strip trial courts of the authority, for good cause shown, to make orders that justice requires to protect a defendant from undue burden caused by the time-constraints imposed by the statute;

2. Direct Respondent Court to vacate its April 22, 2021 and June 15, 2021 orders to the extent they denied Petitioners' Motions for a Protective Order, and enter a new and different order granting the motions and directing Respondent Court to consider and issue an order permitting a reasonable number of additional hours on the record to depose Plaintiff or to provide other remedies prior to the commencement of trial;

3. Issue an alternative writ directing Respondent Court to show cause why it should not be so directed, and upon return to the alternative writ, issue the peremptory writ requested above;

4. Award Petitioners their costs pursuant to Rule 8.493 of the California Rules of Court; and

5. Grant such other relief as may be just and proper.

Respectfully submitted,

HUGO PARKER, LLP

Dated: June 21, 2021 By: /s/ Tina M. Glezakos

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James C. Parker
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Attorneys for Petitioners
CAHILL CONSTRUCTION COMPANY, INC.; CAHILL CONTRACTORS, INC.; FOSTER WHEELER LLC; FRYER-KNOWLES, INC., A WASHINGTON CORPORATION; NIBCO INC.; O'REILLY AUTO ENTERPRISES, LLC; and SWINERTON BUILDERS

VERIFIED PETITION

By this verified petition, Petitioners CAHILL CONSTRUCTION COMPANY, INC., erroneously sued as CAHILL CONSTRUCTION CO., INC. individually and as successor-in-interest to CAHILL BROTHERS; CAHILL CONTRACTORS, INC., erroneously sued as CAHILL CONTRACTORS, INC. individually and as successor-in-interest to CAHILL CONTRACTORS CO., INC.; FOSTER WHEELER LLC (fka FOSTER WHEELER CORPORATION); FRYER-KNOWLES, INC., A WASHINGTON CORPORATION; NIBCO INC.; O'REILLY AUTO ENTERPRISES, LLC f/k/a CSK AUTO, INC.; and SWINERTON BUILDERS ("Petitioners") allege:

1. On January 29, 2021, EDWARD RICHARDS and LINDA RICHARDS filed an asbestos personal injury complaint in Respondent Court entitled *Edward and Linda Richards v. 3M Co., et al.*, Alameda Superior Court, Case No. RG21088294. Plaintiffs allege that Edward Richards was diagnosed with pleural mesothelioma caused by exposure to asbestos.

2. Plaintiffs' Complaint names 105 defendants, many of whom are sued as successors to numerous additional companies and includes as unnamed defendants Does 1-600.

3. Plaintiffs' 69-page Complaint sets forth 11 causes of action, including negligence; strict liability; false representation under Restatement of Torts Section 402-B; intentional tort; premises owner/contractor liability; negligence - clutch & brake components; strict liability - clutch & brake components; third party vessel claim under Longshore and Harbor Workers' Compensation Act; respirator defendants' negligence; respirator defendants – strict liability; and loss of consortium. The Complaint seeks monetary damages and punitive damages. (The Complaint is submitted concurrently herewith as Exhibit A to Supporting Exhibits, pp. 1-69.)

4. The Petitioners herein were served with the Complaint at various times. Each

filed an answer to Plaintiffs' Complaint between March 26 and April 8, 2021. (The Answers are submitted concurrently herewith collectively as Exhibit B to Supporting Exhibits, pp.70-208.)

5. On March 10, 2021, before Petitioners and many of the 105 named defendants appeared in the action, Plaintiffs filed a motion seeking a preferential trial date. (The motion was later granted and a preferential trial date for August 9, 2021 was ordered; Declaration of Tina Glezakos at ¶ 3, submitted concurrently herewith as Exhibit C-3 to Supporting Exhibits, pp. 231-238.)

6. On March 31, 2021, Plaintiffs served "Second Amended Responses to Standard Interrogatories" consisting of 1,010 pages and describing hundreds of products, job sites and employers which Mr. Richards asserted were factually responsible for his exposure to asbestos. (Declaration of Tina Glezakos at ¶ 5, Exhibit C-3 to Supporting Exhibits, pp. 231-238.)

7. Plaintiffs served a notice of a videotaped deposition of plaintiff Edward Richards for April 5, 2021. Plaintiffs subsequently served an "Amended Notice of Deposition of Edward Richards" to commence on April 12, 2021, at a Holiday Inn in Modesto, California, "continuing day to day until completed," in order "to preserve [his] testimony for purposes of trial." (The Amended Notice of Deposition is attached as Exhibit 1 to the Declaration of Sydney Brannon, submitted concurrently herewith as Exhibit C-8 to Supporting Exhibits, ¶ 7, pp. 880-989.)

8. Mr. Richards' videotaped trial preservation deposition commenced on April 12, 2021, and proceeded over several days, and according to the court reporter lasted either eight or nine hours on the record." ("Order Motion for Protective Order Denied" [hereafter the "April Order"], submitted herewith as Exhibit H, to Supporting Exhibits pp. 1466-1480.) Between 80 and 90 defendants attended the deposition. (*Id.* at p. 1466.)

9. On April 9, 2021, Petitioners and four other sets of defendants filed motions

seeking a protective order, asking Respondent Court to increase the time limit above 14 hours. The hearing on all the motions was set for April 22, 2021. (The motions can be found at Exhibit E-6 to Supporting Exhibits, pp. 1216-1247.)

11. Pursuant to Section 2025.295, when a licensed physician attests that the life expectancy of a person suffering from mesothelioma is less than six months, defendants seeking to depose that plaintiff face a presumptive seven-hour time limit in which to complete the deposition. If there are more than 10 defendants appearing at the deposition the court may, in its discretion, increase the time for defendants to ask questions by up to three more hours, and if more than 20 defendants appear then by up to seven more hours, for a maximum cap of 14 hours. No similar time constraints are placed on that plaintiff's attorney of record by the statute. Regardless of the plaintiff's health, his/her own counsel may depose the plaintiff for as long as counsel wants with no time limits whatsoever. (Code Civ. Proc. § 2025.295(b).)

12. At the April 22, 2021 hearing on the motions for a protective order, Respondent Court was advised that from his 1,010 pages of discovery responses and his eight to nine hours of direct examination, Plaintiffs claimed that Mr. Richards had been exposed to asbestos-containing products from 1965 until 1998; that he had worked on numerous types of asbestos-containing *equipment* including pumps, valves, steam traps, strainers, condensers, evaporators, boilers, turbines, generators, cooling towers, coolers, chillers, furnaces, water heaters, air heaters, climate control equipment, and piping; that he had been exposed to multiple types of asbestos-containing *products*, including insulation, insulating materials, asbestos-cement, asbestos-piping, asbestos-louvers, flooring tile, magnesite flooring, terrazzo flooring, mastics, gaskets, tape, sealants, packing, drywall, texture, joint compound, ceiling tile, fireproofing, asbestos cloth, asbestos rope, asbestos paper, adhesives, wires, cabling, and other unidentified materials; that he had worked for *multiple employers* for weeks, months or years at *dozens of locations* including on ships,

shipyards, refineries, power plants, steel plants, generating stations, chemical facilities, hospitals, apartment buildings, schools, commercial buildings, industrial buildings and on PG&E pipelines; and that he had worked alongside *multiple different trades* who themselves worked with asbestos-containing products. Mr. Richards also claims *non-occupational* exposures to automotive brake, clutch and gasket replacements on multiple identified and unidentified vehicles. (*Id*.) (A true and correct copy of the Reporter's Transcript of Proceedings for April 22, 2021 is attached as Exhibit L to Supporting Exhibits, pp. 1516-1558.)

13. Respondent Court granted an additional seven hours, for a maximum of 14 hours authorized by Section 2025.295(b)(2). Respondent Court denied Plaintiffs' request to limit the cross-examination portion of the deposition to the presumptive seven hours: "However, Plaintiffs do not present any evidence, such as a treating physician's declaration, that granting defendants 14 hours of total deposition cross-examination would endanger Mr. Richard's [sic] health. The Court, therefore, finds that the health of Mr. Richards does not appear to be endangered by the grant of additional time." The Court added: "Needless to say, where there are more than 100 named defendants, it is in the interest of fairness to allow defendants the maximum permissible period in which to cross-examine Mr. Richards." (April Order, Exhibit H to Supporting Exhibits, at p. 1468.)

14. Respondent Court rejected Petitioners and other defendants' arguments that it should grant more time for cross-examination: "Defendants' due process/basic fairness argument may be more compelling but the parties cite no authority that would allow [Respondent Court] to extend the 'clear cap' specified in Section 2025.295(b)." (April Order, Exhibit H to Supporting Exhibits, p. 1467.) Respondent Court found that Section 2025.290 and the holding of *CertainTeed Corp. v. Sup. Ct.* (2014) 222 Cal.App.4th 1053, give Respondent Court discretion to increase the time available for all other depositions, whereas Section 2025.295 "has *eliminated any discretion* when the witness has either

mesothelioma or silicosis and a licensed physician has submitted a competent declaration declaring that there is substantial medical doubt of the survival of the deponent beyond six months." Respondent Court noted that the Final Senate Floor analysis had characterized Section 2025.295 as providing a "clear cap," the only direct interpretation of Section 2025.295 cited in the Order. (April Order, Exhibit H, pp. 1467-1468; emphasis added.) The parties' due process right to a fair cross-examination were unavailing because, from Respondent Court's viewpoint, "there is no constitutional right to discovery and in any event, the Court finds the briefing on this significant issue is wanting." (*Id.* at p. 1468.)

15. On April 24, 2021, Petitioners filed a Petition for Writ with this Court seeking an order that Respondent Court provide more time. Division Five denied the petition because Mr. Richards's deposition had not yet been completed and Petitioners had not demonstrated either irreparable harm or an exhaustion of possible remedies through Respondent Court. (Order Denying Petition, April 26, 2021, Exhibit I to Supporting Exhibits, pp. 1481-1482.)

16. The defense portion of the deposition of Mr. Richards began April 26, 2021 and completed on May 3, 2021, with 80-90 defendants collectively consuming all 14 hours allotted to them, with each defense counsel averaging less than eight minutes each for questions as to his or her client.

17. Upon exhaustion of the 14 allotted hours, Petitioners filed a renewed Motion for Protective Order with Respondent Court seeking more time and/or other appropriate remedies. The motion, joinders, opposition, and reply papers are attached as Exhibits C, D, E, F and G to Supporting Exhibits, pp. 209-1465. Because Judge Lee, who had heard the matter in April, was on leave, the matter was assigned to the Hon. Michael Markman. (Order Assigning Judge Markman, Exhibit J to Supporting Exhibits, pp. 1483-1496.)

18. In support of the renewed motion, Petitioners submitted substantial evidence establishing the irreparable harm caused by the 14-hour time limit imposed for

cross-examination, which resulted in on average less than 10 minutes of examination by each defendant, especially in comparison to the approximately nine hours of sworn testimony elicited by Mr. Richards' own counsel. (See Exhibits C, D, F to Supporting Exhibits.)

19. The motion was heard on June 15, 2021 and denied by Respondent Court by order issued the same day. Judge Markman, however, unlike Judge Lee, found that the court had "limited discretion" to order more time, but declined to exercise that discretion. (June Order, Exhibit K to Supporting Exhibits, pp. 1497-1515.) Judge Markman also certified the issues to this Court. (Code of Civil Procedure § 166.1.)

20. A copy of the transcript of the June 15, 2021 hearing has been ordered by Petitioners and as soon as it becomes available will be submitted as Exhibit M to Supporting Exhibits.

WHEREFORE, Petitioners pray that this Court:

1. Issue a peremptory writ of mandate and/or prohibition in the first instance, finding that Section 2025.295 does not strip trial courts of the authority, for good cause shown, to make orders that justice requires to protect any party from undue burden caused by the time-constraints imposed by the statute;

2. Direct Respondent Court to vacate its April 22, 2021 and June 15, 2021 orders to the extent they denied Petitioners' Motions for a Protective Order, and enter a new and different order granting the motions and directing Respondent Court to consider and issue an order permitting a reasonable number of additional hours on the record to depose Plaintiff or to provide other remedies prior to the commencement of trial;

3. Issue an alternative writ directing Respondent Court to show cause why it should not be so directed, and upon return to the alternative writ, issue the peremptory writ requested above;

4. Award Petitioners their costs pursuant to Rule 8.493 of the California Rules of Court; and

5. Grant such other relief as may be just and proper.

Respectfully submitted,
HUGO PARKER, LLP

Dated: June 21, 2021 By: _/s/ Tina M. Glezakos

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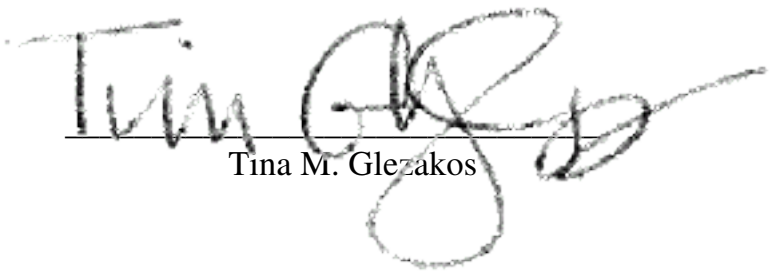
VERIFICATION

I, Tina M. Glezakos, declare as follows:

I am an attorney with Hugo Parker, LLP, attorneys for Petitioners. I have read the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and know its contents. The facts alleged therein are true within my own knowledge or based upon my review of the pleadings and other documents contained within the Court's files. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioners, verify this Petition.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of June 2021, at San Francisco, California.



Tina M. Glezakos

MEMORANDUM OF POINTS AND AUTHORITIES

A. SECTION 2025.295 DOES NOT STRIP TRIAL COURTS OF THEIR STATUTORY AND INHERENT POWERS TO FASHION ORDERS REQUIRED BY JUSTICE

1. General Discovery Principles

Pursuant to the California Civil Discovery Act, any party to a civil action is entitled to obtain discovery, including taking the oral deposition of any person with knowledge of "any matter…that is relevant to the subject matter involved in the pending action." (Code Civ. Proc. § 2017.010. See also Code Civ. Proc. § 2019.010 [methods of discovery].)

The Civil Discovery Act vests trial courts with broad authority to control "the sequence and timing of discovery" for all six categories of discovery permitted. (Code of Civil Proc. §§ 2019.010; 2019.020; 2019.030.) Within the category of depositions, the courts may make "*any order* that justice requires to protect any party, deponent, or other natural person or organization," including that the deposition be taken on "only on specified terms and conditions." (Code of Civil Procedure § 2025.420; emphasis added.)

The broad right to discovery is consistent not only with the legislative intent behind the creation of the original Discovery Act to "take the gamesmanship out of litigation" (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376), but also with the constitutional right to due process which allows a defendant to conduct discovery so that it might fully prepare its defense to the claims asserted against it in advance of trial. (*Tokio Marine & First Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 123.)

The California Supreme Court, in *Greyhound, supra*, discussed the singular importance of a deposition:

> The new system, as did the federal system (cit. om.), was intended to accomplish the following results: (1) *to give greater assistance to the*

> *parties in ascertaining the truth and in checking and preventing perjury*; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.

(*Greyhound, supra*, 56 Cal.2d at pp. 375-376 [emphasis added]. See also *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; *Hickman v. Taylor* (1947) 329 U.S. 495, 507 ["Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."]; *United States v. Procter & Gamble Co.* (1958) 356 U.S. 677, 682 [rules favoring broad discovery help "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."].)

2. Code of Civil Procedure Section 2025.295 Uniquely, Arbitrarily and Unfairly Attempts to Interfere with a Trial Court's Ability to Exercise Discretion to Increase the Time Permitted to Complete a Plaintiff's Deposition

The Legislature imposed time limits on depositions in 2012 through the addition of Section 2025.290, which sets a presumptive time limit of seven hours during which all counsel – except the deponent's counsel of record – must complete their individual examinations. Importantly, the Legislature expressly permitted the trial courts to adjust the time limit as circumstances may warrant: "The statute gives no guidance as to how a court should exercise its discretion when considering a request to lengthen a deposition time although it identifies a case management order as an appropriate type of order. It does,

however, identify two circumstances under which the court must extend the deposition's length: 'if needed to fairly examine the deponent" or if anyone or anything "impedes or delays the examination.'" (Hogan and Weber "California Civil Discovery," Second Ed. (LexisNexis, 2020) § 2.7.)

On January 1, 2020, new Section 2025.295 became effective and created time limits on depositions for mesothelioma and silicosis plaintiffs. If a physician attests in a declaration that a plaintiff has mesothelioma or silicosis and there is substantial medical doubt of his survival beyond six months, a presumptive seven-hour time limit is imposed on the defendants' cumulative time to examine the plaintiff, which may be increased if the Court finds that plaintiff's health would not be endangered, but only by three hours if 10 or more defendants appear for the deposition, and up to a maximum of 14 hours if more than 20 defendants appear. No matter how many defendants have been named above 20, whether it be 21 or over 100 as here, and no matter what the circumstances of the case might be, Section 2025.295 seeks to remove from the trial courts any discretion to increase defendants' cumulative deposition time beyond 14 hours. No time limit, whatsoever, is similarly imposed on a plaintiff's attorney's examination of the plaintiff, regardless of the asserted medical impact on a plaintiff's health underpinning the purpose of the statute.

Prior to the adoption of Section 2025.295, trial courts controlled the amount of time available to defendants to depose plaintiffs in asbestos cases through case management orders and, as necessary, on a case-by-case basis, through informal discovery conferences and law and motion work. The courts, in particular Respondent Court in Alameda, and the San Francisco and Los Angeles Superior Courts, had spent years vetting and evaluating procedures for all aspects of asbestos cases, leading to General Orders and Case Management Orders, which typically provided for 20 hours of total deposition time to examine a plaintiff, with the ability to seek more time as may prove necessary by the specific facts of the case. (See CJAC March 25, 2019 Letter to Senate Judiciary Committee,

submitted by Plaintiffs in support of Request for Judicial Notice, filed concurrently herewith as Exhibit E-6, pp. 1213-1434.)

Depositions in asbestos cases have been governed this way for years because they are deemed "complex" and so fall outside the general rule that depositions are limited to seven hours. Even in non-asbestos civil cases, however, the seven-hour rule is not inviolate. The "court shall allow additional time . . . if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." (Code Civ. Proc. §2025.290(a).)

At one time, the Los Angeles Superior Court believed it could not allow more time for a plaintiff's asbestos deposition even though the plaintiff's law firm – the same law firm here – had sued over 70 defendants. The trial court agreed that the issue required appellate guidance. The Second District granted the resulting petition for a writ of mandamus and held that the trial courts retained the discretion to adjust the time allowable for an asbestos plaintiff's deposition. (*CertainTeed*, *supra*, 222 Cal.App.4th at p. 1056.)

In reaction to *CertainTeed*, the Legislature added Section 2025.295, which carves out a unique, unprecedented exception to the discretion expressed in Section 2025.290. While the statute permits a trial court to grant additional time, unlike the unfettered discretion allowed by Section 2025.290, under Section 2025.295 the trial court may only grant three additional hours "if there are more than 10 defendants appearing at the deposition" and only up to seven additional hours if there are more than 20 appearing defendants. And, unlike Section 2025.290, where the trial court "shall allow" additional time if circumstances warrant, under Section 2025.295 the trial court may not exceed the additional thee hours for 10 or fewer defendants, and seven hours for 20 or more defendants regardless of circumstances. Before granting the additional three to seven additional hours, the trial court must find that an extension of time would be "in the interest of fairness, which includes consideration of the number of defendants appearing at the deposition and

determines that the health of the deponent does not appear to be endangered by the grant of additional time."

3. Appellate Review Is Needed to Determine if Section 2025.295 Does or Does Not Conflict with the Discretionary Power Authorized in Section 2025.24

Nothing in Section 2025.295 directly addresses a trial court's power to grant protective orders or otherwise control the litigation. Yet, as read by one member of Respondent Court, Section 2025.295 does eliminate all discretion.

As read by another member of Respondent Court, however, Section 2025.295 does not override Code of Civil Procedure section 2025.420 which specifically grants discretion to the courts to control *all depositions*. Section 2025.420(a) provides that "[b]efore, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order." If the motion establishes "good cause," the Court "may make *any order that justice requires* to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc. §2025.420(b) [emphasis added].) The protective order may include that the deposition be taken on certain specified terms and conditions. (*Id.* §2025.420(b)(5).) Furthermore, "if one party is seeking an unfair advantage from the timing of the deposition, the other may seek a protective order." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) ¶ 8:678.)

No complete, total removal of a trial court's discretionary authority over discovery exists anywhere – except now in Section 2025.295. Since January 2020, Section 2025.295 has stood in stark, drastic contrast to every other provision of the Civil Discovery Act. It also stands in stark, drastic contrast to the time limit rules for depositions of other jurisdictions and of the federal courts. Effective 2000, Congress amended Rule 30 of the Federal Rules of Civil Procedure to impose a presumptive seven-hour time limit on

depositions. The time limit can be altered by agreement of the parties *or* by court order following a motion showing good cause. "Parties considering extending the time for a deposition—and courts asked to order an extension—might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination.[2] If the examination will cover events occurring over a long period of time, that may justify allowing additional time.[3] In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest."[4] Similarly, should the lawyer for the witness want to examine the witness, that may require additional time." (Fed. R. Civ. Proc., Rule 30, Committee Notes on Rules, 2000 Amendment.)

Other factors besides those suggested by the Committee Notes could come into play that would make more time mandatory. "In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an "other circumstance," which might include a power outage, a health emergency, or

2 Mr. Richards did not require an interpreter, but interpreters have been needed in asbestos cases.

3 Mr. Richards's work history spanned more than three decades and involved countless products, employers and job sites.

other event." (Fed. R. Civ. Proc., Rule 30, Committee Notes on Rules, 2000 Amendment)

In considering whether to enact Section 2025.295, the Senate Judiciary Committee pointed to the time limit rules found in Arizona and Texas but failed to adopt the judicial discretion contained in those States' statutes. (Senate Judiciary Committee report, submitted by Plaintiffs in Opposition to Petitioners' Motion for a Protective Order, Exhibit submitted by Plaintiffs in support of Request for Judicial Notice, filed concurrently herewith as Exhibit E-6 to Supporting Exhibits, pp. 1423-1431.) Arizona Rules of Civil Procedure, Rule 30(d)(1) sets a four-hour time limit on depositions, "[u]nless the parties agree or the court orders otherwise." Likewise, Texas Rules of Civil Procedure, Rule 190.2(b)(2) sets a 20-hour time limit for all depositions but "the court may modify the deposition hours so that no party is given an unfair advantage."

Judge Markman's June 15, 2021 Order correctly ruled that a trial court retains at least some discretion through Section 2025.420 to issue protective orders that depart from the cap on deposition time in Section 2025.295. (Exhibit K, pp. 1497-1503.) This is in line with several provisions within California's Code of Civil Procedure. Specifically, per Code of Civil Procedure section 128, subdivision (a)(8), every court shall have the power to "amend and control its process and orders so as to make them conform to law and justice." Code of Civil Procedure section 187 provides as follows: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

The bottom line is that trial courts must maintain some discretion to fashion real-time equitable remedies, including in the context of depositions. Had Respondent

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4 Defendants here arranged for two counsel to ask questions of common interest.

Court initially ruled that it maintained discretion to adjust the 14-hour cap on the 80-90 defendants appearing at Mr. Richards's deposition to allow each defendant more than minutes of cross-examination, the undeniable prejudice to defendants would have been averted. However, that did not happen, and Petitioners are now forced to seek ex post facto relief from this Court.

4. The Value of Depositions Cannot Be Overstated

This issue is important to resolve. "Depositions have been hailed as "the most effective discovery tool." (Hogan and Weber "California Civil Discovery," Second Ed. (2020) § 1.4.) Unlike the other five discovery tools available under the Discovery Act, the deposition allows immediate, face-to-face interrogation and follow-up questioning. The testimony is often admissible at trial and can be considered by the trier of fact for the credibility of the deponent.

In asbestos cases, the deposition of the plaintiff is almost always the most important tool for discovering the factual foundation for the claims made against a particular defendant. In fact, the outcome of the plaintiff's deposition can prove dispositive. (See, e.g., *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098.) A plaintiff's own counsel already knows the facts concerning plaintiff's claims as counsel obtained them from their own client before drafting the complaint. But counsel is under no immediate obligation to disclose those facts to defendants. While written discovery may prove helpful to reveal some information, it is no replacement for real time deposition cross-examination which allows for immediate follow-up to evasive or overbroad answers from a deponent. Written discovery responses, crafted by a plaintiff's counsel, are no substitute for live cross-examination of a plaintiff; especially in preference cases (which a significant proportion of mesothelioma cases subject to Section 2025.295 are) where the window to conduct written discovery and compel further responses is severely restricted. "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." (*Target Nat'l Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1, 7 ["*Target*"], citing *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585.)

"The deposition is both the most expensive and the most effective discovery tool. Unlike the other devices, it allows on-the-spot, face-to-face interrogation and follow-up questioning. In addition, the deposition itself will often be admissible in evidence at trial. A party's deposition is admissible against it under the exception to the hearsay rule for admissions of a party opponent. A nonparty's deposition will be admissible should the deponent, for one of several statutorily defined reasons, be unavailable to testify at trial. In any event, should a witness's trial testimony vary from the deposition testimony, the earlier answers are admissible as prior inconsistent statements. As such, they are usable not only to impeach the trial version, but, in California, also substantively (that is, for the truth of the matter asserted) under a hearsay rule exception." (Hogan, *supra*, § 1.4.)

Prior to filing his lawsuit, a plaintiff typically has unfettered time to prepare his case by identifying defendants, gathering evidence and planning his pleadings. In recognition of this advantage, and of the importance of depositions, a plaintiff must wait a minimum of 20 days after a defendant has been served or made an appearance before noticing any depositions. (Code Civ. Proc. § 2025.210(b).) "This temporary hobbling of the plaintiffs' right to launch deposition discovery is designed to allow a defendant time to hire an attorney and learn the nature of the suit. Moreover, it provides a brief opportunity for defendants to take the first depositions. This "deposition hold" also prevents a plaintiff from "jumping the gun" by launching discovery before defendants are even aware of the litigation." (Hogan, *supra*, § 2.2.) The hold also "provides the minimum protection that at least one defendant is on notice and has the opportunity to place some adversarial limits upon the plaintiff's pursuit of discovery. [¶] … A calculating litigant might conclude that it

could benefit from the opportunity to access information it might not otherwise have if an adversary were on notice of the litigation and able to raise valid objections." (*Cal. Shellfish Inc. v. United Shellfish Co.* (1997) 56 Cal.App.4th 16, 22-24.)

Deposition testimony is invaluable in several specific ways. First, of course, it is an investigative tool for learning the facts necessary for development of the case. That is especially true of an asbestos plaintiff's testimony where the case turns on events that occurred decades in the past and documents and witnesses are no longer available, making the plaintiff's testimony often the only direct evidence of his or her claimed exposure to a defendant's product or conduct.

Deposition testimony is generally admissible at trial and relevant for several purposes, primarily as actual evidence and for impeachment. Although the "Evidence law considers a deposition to be inferior to live testimony: 'The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.' [quoting *Napier v. Bossard* (1939, CA2 NY) 102 F.2d 467, 469] After all, deposition testimony, though given under oath and subject to cross-examination, is nonetheless hearsay evidence: 'When offered to prove the truth of what it asserts, [a deposition] is hearsay, and may be received in evidence only if it is admissible under an exception to the hearsay rule. [quoting *Jobse v. Connolly* (1969, Misc) 302 NYS2d 35, 37] Reading a transcript of deposition testimony into evidence at trial deprives the trier of fact of the opportunity to use demeanor in assessing the deponent's credibility: Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Despite this shortcoming, however, the oath and the opportunity for cross-examination do make deposition testimony much more reliable than most other forms of hearsay evidence." (Hogan, *supra*, § 2.37.)

If the deponent is not available at trial, his testimony may be read to the jury and used against a party provided that the party was either present at the deposition or had notice of the deposition and did not serve a valid objection. (Code Civ. Proc. § 2025.620.) When confronted by deposition testimony at trial, the only protection a party has is the "Rule of Completeness." As Hogan and Weber point out, a party offering deposition transcript testimony in evidence "should select just the portions that are directly relevant to what that party wants to prove. . . . However, this right to pick the favorable parts of the deposition does not include the distortion of the deponent's meaning. The antidote for this abuse is the 'rule of completeness': '[I]f the party introduces only part of the deposition, any party may introduce any other parts that are relevant to the parts introduced.' [quoting *Westinghouse Electric Corp. v. Wray Equipment Corp.* (1961, CA1 Mass) 286 F.2d 491, 498]. The rule of completeness prevents a deponent's testimony from being taken out of context: The rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence. The court has no duty to admit sua sponte the parts necessary to provide context. The opposing party must move to supplement the testimony already admitted." (Hogan, *supra*, §2.37.)

The deposition testimony can be used for impeachment purposes. There is nothing that prevents a witness from contradicting or outright denying statements or testimony he or she has given in the past. However, that witness can be confronted by the prior statements which are an exception to the hearsay rule. "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing …." Section 2025.620 incorporates this exception when it allows use of a deposition not only to impeach or contradict a witness, but also 'for any other purpose permitted by the Evidence Code.' Thus, whenever a portion of a deposition is

received in evidence to impeach the deponent's credibility, the trier of fact may also use that deposition testimony substantively, that is, as the correct account of the facts involved." (Hogan, *supra*, § 2.37.)

Finally, depositions may be relied upon by experts as a basis to form opinions. (See, e.g., *People v Sanchez* (2016) 63 Cal.4th 665.)

To summarize, depositions are a primary tool for investigating a plaintiff's case, are admissible as evidence at trial, can substitute for the unavailable witness, are the primary tool for impeaching a witness and form the basis for experts' opinions. The arbitrary and immovable time limits imposed on defendants in just one category of personal injury cases by Section 2025.295 creates a setting in which the value of a plaintiff's deposition is no better than a self-serving statement or written declaration.

5. As Interpreted by Respondent Court, Section 2025.295 Caused Irreparable Harm to Petitioners

If ever there was a situation that calls for Respondent Court to exercise its statutory and inherent authority, it is this one. That over 100 defendants find themselves brought together in a single lawsuit should not operate as a procedural check, cancelling their right and opportunity to effectively cross-examine Plaintiff in advance of trial.

Mr. Richards was diagnosed in January 2021 with pleural mesothelioma, which he claims is due to decades of exposure to asbestos. Plaintiffs' attorney noticed Mr. Richards's deposition for the express purpose of preserving his testimony for trial. Between April 12 and 16, 2021, Mr. Richards willingly sat for that deposition, answering questions posed by his own attorney for approximately nine hours (540 minutes). Conversely, each defendant was afforded approximately 8-9 minutes to cross-examine Mr. Richards. No reasonable person would view this as parity under the law.

Mr. Richards was deposed by his own attorney for the express purpose of *preserving* his testimony. Mr. Richards submitted evidence to Respondent Court that he is unlikely to

be able to meaningfully participate in the August trial of this matter and was on that basis granted a preferential trial date. If so, then Mr. Richards' videotaped deposition will be played for the jury in lieu of live testimony. For all practical purposes, that means that defendants' cross-examination of Mr. Richards will appear to the jury to have been worth no more than a few minutes of rushed cross-examination. There is no parallel rule to Section 2025.295 that limits a defendant's cross-examination of a mesothelioma plaintiff providing testimony at trial. A trial court would almost certainly allow a defendant more than a few minutes to cross-examine the plaintiff before the jury at trial. While defendants may be able to move to exclude Mr. Richards' deposition at trial, based on a lack of fair opportunity to cross-examine him, that lack of opportunity is the result of the arbitrary time cap set in Section 2025.295 *on only* defendants.

Defendants also face the risk that should Mr. Richards' spouse, plaintiff Linda Richards, and other heirs bring a wrongful death action, Mr. Richards' preserved testimony will be admissible against any defendant who had notice of his deposition – even if such defendant could not meaningfully participate in the deposition due solely to the arbitrary time limit created by the statute and Respondent Court's lack of discretion to ameliorate its impact. (Evidence Code §§ 1291; 1292 [admissibility of former testimony].)

Plaintiffs here have capitalized on an unfair, lopsided advantage. They had weeks to prepare for the deposition and unlimited time to carefully and strategically preserve the testimony they wanted. Defendants had far less time to prepare and but minutes to cross-examine.

Defendants had just minutes on average not only to test Mr. Richards' recall of exposure to their own products, but to learn of the potential liability and fault of others that had not been raised or covered by Mr. Richards's experienced counsel. The law requires that defendants prove the possible fault of others. (See Code of Civil Procedure § 1431.2 [allocation of fault rules]; *Phipps v. Copeland Corporation LLC* (May 18, 2021) B302627

at pp. 2, 15-16 [burden of proof for allocation of fault rests on defendants at trial]. See also, *Pfeifer v. John Crane* (2013) 220 Cal.App.4th 1270, 1285.) The plaintiff is often the most important witness as to the exposure to asbestos he experienced from products and conduct not related to the defendants he has sued. His deposition is, therefore, valuable for the fair implementation of California's Proposition 51 rules and another reason for permitting fair examination at the deposition.

6. The Time Limitations of Section 2025.295 Violate Defendants' Right to Due Process and to Confront Witnesses, Especially If Trial Courts Are Precluded from Intervening as Equity Requires

There is no other statute or rule anywhere in the United States that places a finite cap on the time allowed to complete a plaintiff's deposition *without giving the court discretion to adjust the cap*. California permits such discretion in every civil case *except* as to plaintiffs in mesothelioma and silicosis cases without serious explanation as to why this class of persons is subject to such a unique and inflexible statutory scheme. (Code Civ. Proc. § 2025.290 [seven-hour deposition time limit on plaintiff's deposition may be increased in discretion of court]; *CertainTeed, supra*, 222 Cal.App.4th at p. 1056.) California's Section 2025.290 is modeled on the Federal Rules of Civil Procedure, Rule 30(d), which provides a seven-hour presumptive time limit for depositions but which, in its discretion, a federal district court can increase. The same is true of Texas' 20-hour deposition time limit that allows the court to modify the deposition hours "so that no party is given an unfair advantage." (Texas Rules of Civil Procedure, Rule 190.2 (b)(2).) Even for the shortest time limit for depositions we have found – four hours in Arizona – the court has discretion to increase the time. California, for this one very discrete class of plaintiffs, stands alone in having created a flat, no-discretion, no-exceptions rule.

Petitioners do not dispute Judge Markman's finding that Section 2025.295 survives a *facial* constitutional challenge. Time limits, in and of themselves, are routinely imposed as part of federal and state statutory schemes and trial court orders. (Exhibit K to

Supporting Exhibits, pp. 1497-1503.) However, Petitioners do dispute that the statute survives an *as-applied* challenge, especially when viewed in light of the facts at bar. Respondent Court ruled that "[b]y enacting Section 2025.295, the Legislature necessarily reached a conclusion that health considerations for a small class of terminally ill witnesses made it appropriate to limit the time that the witness needed to spend answering questions in a deposition." (*Id.* at p. 1501.) However, this is not what the statute in fact does. It only imposes the limit one on side of the "v." in a case. If health considerations truly underpinned the Legislature's rationale for the statute, then an across-the-board limitation would be imposed without regard to the questioner. Mr. Richards was able to withstand approximately nine hours of examination by a single attorney, his own counsel. Petitioners are not seeking to be allowed nine hours each to cross-examine Mr. Richards. Rather, they are asking to be afforded a fair amount of time, which here was clearly more than mere minutes on average to confront Mr. Richards.

The facts surrounding the conduct of Mr. Richards' deposition, the disparity in time afforded for examination between plaintiffs and defendants, and the attendant consequences of the use of Mr. Richards' sworn testimony at trial in this case, and future cases, conclusively establish that the application of Section 2025.295 has deprived Petitioners of due process. (See *Tobe v. City of Santa Ana* (1995) Cal.4th 1069, 1084 ["an as-applied challenge 'contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right.'"].) This is especially true where, as argued above, Respondent Court initially ruled Section 2025.295 stripped it of all discretion to fashion any equitable remedies to increase the time above the 14-hour cap afforded to defendants to initially cross-examine Mr. Richards, even though Respondent Court also found that Mr. Richards' health would not be endangered by affording additional hours for

deposition. Petitioners have put forth specific facts giving rise to the alleged violation of their right to confront and examine Mr. Richards, especially in light of the extensive examination conducted by his own counsel, an examination aimed at creating a distorted version of the asbestos exposures suffered by Mr. Richards in order to shine a light on only the named defendants and to leave other tortfeasors in the shadows. (See *Coffman Specialties, Inc. v. Dept. of Transportation* (2009) 176 Cal.App.4th 1135, 1145.)

By his account, Mr. Richards' exposures to asbestos began over 55 years ago and encompassed more than three decades. During that time, he believes he encountered hundreds of asbestos-containing products and equipment in hundreds of settings. At his deposition, Mr. Richards's attorney chose to examine him about those aspects of his work history that would selectively highlight and implicate Petitioners and the other named defendants. Counsel consumed at least eight hours on the record capturing that testimony. Defendants bear the burden of proving the potential liability of parties not named by Mr. Richards as defendants, such as his employers, branches of the U.S. military, entities that have become defunct or have no insurance or assets, and entities now protected by the bankruptcy laws. (Code Civ. Proc. § 1431.2 [Proposition 51].) The evidence developed from a plaintiff's deposition can prove dispositive. (See, e.g., *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098.) Defendants simply seek a fair opportunity to ask their own questions to test Mr. Richards' recollection.

"A person's right of cross-examination and confrontation of witnesses against him in noncriminal proceedings is part of procedural due process guaranteed by the Fifth Amendment and Fourteenth Amendment of the federal Constitution, where there is involved a threat to life, liberty or property." (*Target*, *supra*, 216 Cal.App.4th at p. 7, citing *August Dept. of Motor Vehicles* (1968) 264 Cal.App.2d 52, 60.) "The right of cross-examination has been termed 'the greatest legal engine ever invented for the discovery of truth.'" (*Target*, *supra*, citing *People v. Ramirez* (1979) 25 Cal.3d 260, 280.)

Construing Section 2025.295 to provide an absolute bar of 14 hours does not provide the necessary flexibility to consider due process concerns when more than 20 defendants are present at a deposition. It is imperative that Section 2025.295 be interpreted *by appellate authority* as not depriving trial courts of their usual discretion to fashion equitable remedies on a case-by-case basis. As written, Section 2025.295 will likely be interpreted at least by some as eliminating all discretion, and thereby to authorize any number of situations where the inflexibility creates injustice.

While Respondent Court found that Petitioners were able to "participate" in the deposition of Mr. Richards under the mandate of Section 2025.295, participation alone cannot be the standard. (Exhibit K to Supporting Exhibits.) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. . . . [T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*People v. Brown* (2003) 31 Cal.4th 58, 538.) Even in noncriminal cases, a person's right to cross-examination is a part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment of the federal Constitution . . ." (*August v. Dept. of Motor Vehicles* (1968) 264 Cal.App.2d 52, 60.) Cross-examination is an absolute right, the denial of which violates a party's due process rights. (*Long v. Long* (1967) 251 Cal. App. 2d 732, 736.) The right to cross-examine a witness is fundamental in our judicial system. (*Harries v. United States* (9th Cir. 1965) 350 F.2d 231, 236.)

As set forth in detail in the evidence submitted in support of Petitioners' motion, the time constraints imposed on Petitioners impermissibly impeded their ability to conduct even a bare-minimum cross-examination. For example, counsel for one Petitioner affirmed that Petitioner was "unable to fully inquire as to which specific ships on which plaintiff observed [Petitioner] employees performing work, nor was [Petitioner] able to examine

plaintiff regarding the specifics of the work plaintiff recalled seeing, in terms of what it was [Petitioner's] employees were doing, how often he saw this work being performed his proximity to the work, and how long he was in the vicinity of [Petitioner's] employees performing this work. Additionally, [Petitioner] was unable to examine Plaintiff regarding the specific products he recalled [Petitioner's] employees using on those occasions." (Exhibit C-5 at p. 652 [1533:11-1534:7 of Richards' deposition transcript].) This is but one example laid bare by the record. (Exhibits C4-C-6; C-8, F-2.) Without this basic information, and the ability to conduct the spontaneous, live, in-person exchange with Plaintiff afforded by the deposition process, Petitioners were irreparably harmed in their defense of this action, not just in the discovery phase, but also in preparing dispositive motions and all the way through trial. This is especially true when juxtaposed with the detailed and lengthy examination that Plaintiffs' counsel was allowed to conduct, unfettered by any statutory time constraints.

Petitioners are not arguing that time limits on the deposition of a terminally ill party can never be imposed by the Legislature. Rather, Petitioners have established how the application of an inflexible cap, without regard to the circumstances of a particular case and the ability of trial courts to intervene, has resulted in a violation of Petitioners' due process rights that must be remedied by this Court.

B. THIS PETITION RAISES AN ISSUE OF WIDESPREAD IMPORTANCE ON WHICH RESPONDENT COURT HAS REQUESTED GUIDANCE

An appellate court may properly issue a prerogative writ where a discovery dispute raises questions of first impression that are of general importance to the bench and bar, and whose resolution will provide general guidelines for use in future cases. (See *Pacific Tel. & Tel. Co., supra,* 2 Cal.3d at p. 169.)

Section 2025.295 has not been interpreted by any appellate court. It is the only

statute or rule anywhere in the United States that purports to take away all discretion of the trial courts to supervise the timing of depositions. Section 2025.295 was interpreted in this case to mean that although the "maximum permissible period" should be allowed for cross-examination, and that plaintiff's health was not endangered by sitting for more deposition time, defendants are effectively limited to eight to nine minutes on average to cross-examine a plaintiff who seeks substantial compensatory, special and punitive damages.

Respondent Court has certified this matter for appellate review, finding that reasonable minds could differ over whether the statute leaves any room for discretion, as well as when and how such discretion is to be exercised. Petitioners also believe the statute leaves room for discretion, and must, to pass constitutional muster. Respondent Court – and the parties – need appellate guidance as to what factors to consider for an allowance of more time or to fashion other equitable remedies. As stated above, in addition to the witness' health, these should include (1) the number of defendants; (2) the types of defendants and the divisions among them; (3) the length and breadth of the plaintiff's exposure history; (4) the number of occupations and work sites at issue; (5) whether other discovery or evidence has become available prior to commencement of the deposition; (6) if the deponent, another person or some other circumstance impedes the deposition; and (7) if otherwise needed to fairly examine the deponent.

This Court can and should take the opportunity presented by the facts of this case to affirm the existence of discretion in the trial courts to extend the deposition limits of Section 2025.295 when justified and appropriate.

CONCLUSION

Respondent Court erred in first not finding any discretion to grant any relief under Section 2025.295, and then finding there was discretion but declining to exercise that discretion to either grant more time to any of the Petitioners or other defendants to cross-examine Mr. Richards.

Granting this writ petition would not only best serve the interests of defendants to this action but would also provide guidance and direction to litigants in future cases when time limits on depositions of mesothelioma and silicosis plaintiffs are implicated.

For the reasons set forth herein, Petitioners pray that this Court:

1. Issue a peremptory writ of mandate and/or prohibition in the first instance, finding that Section 2025.295 does not strip trial courts of the authority, for good cause shown, to make orders that justice requires to protect any party from undue burden caused by the time-constraints imposed by the statute;

2. Direct Respondent Court to vacate its April 22, 2021 and June 15, 2021 orders to the extent they denied Petitioners' Motions for a Protective Order, and enter a new and different order granting the motions and directing Respondent Court to consider and issue an order permitting a reasonable number of additional hours on the record to depose Plaintiff or to provide other remedies prior to the commencement of trial;

3. Issue an alternative writ directing Respondent Court to show cause why it should not be so directed, and upon return to the alternative writ, issue the peremptory writ requested above;

4. Award Petitioners their costs pursuant to Rule 8.493 of the California Rules of Court; and

5. Grant such other relief as may be just and proper.

Respectfully submitted,

HUGO PARKER, LLP

Dated: June 21, 2021

By:_/s/ Tina M. Glezakos__

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CERTIFICATE OF WORD COUNT

I certify that this document contains 10,582 words, including footnotes but not Tables of Content or Authority, according to the Microsoft Word counting feature.

Tina M. Glezakos

Richards, Edward & Linda v. 3M Company, et al.
CALIFORNIA COURT OF APPEAL - First Appellate District Case No._____
]Alameda County Superior Court Case No. RG21088294]
File & ServeXpress Transaction No.: 66703413

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My electronic notification address is service@hugoparker.com and my business address is 240 Stockton Street, 8th Floor, San Francisco, California 94108. On the date below, I served the following:

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES (SUPPORTING EXHIBITS FILED CONCURRENTLY HEREWITH)

on the following:

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(X) **BY ELECTRONIC TRANSMISSION**: Pursuant to CCP 1010.6 and CRC 2.251**,** or pursuant to the Stipulation and Order Authorizing Electronic Service, or by an agreement of the parties. I electronically e-served through File & Serve*Xpress* and caused the document(s) to be sent to the person(s) at the email addresses designated on the Transaction Receipt located on the File & Serve*Xpress* website. To the best of my knowledge, at the time of the transmission, the transmission was reported as complete and without error.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 21, 2021, at San Francisco, California.

Ginger Williams