SUPREME COURT
FILED

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No. S233526

IN THE

SUPREME COURT OF CALIFORNIA

SWEETWATER UNION HIGH SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

GILBANE BUILDING COMPANY et al.

Defendants and Appellants.

On Petition for Review from a Decision of the Court of Appeal, Fourth Appellate District, Division One, No. D067383, on Appeal from an Order of the Superior Court, County of San Diego, No. 37-2014-00025070-CU-MC-CTL
Hon. Eddie C. Sturgeon, Judge

REPLY SUPPORTING PETITION FOR REVIEW

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Reply

This reply uses the same abbreviated terms used in the petition.

1. The Court of Appeal's Opinion Revives a Conflict of Appellate Decisions.

The District attempts to explain away the conflict of decisions of the Courts of Appeal. (Ans. pp. 1-4.) This is feckless. The Opinion is the sole source for what the Opinion holds, and it holds *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142 is good law despite being rejected in *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 690, 693–697, and *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1347–1348. Because the Court of Appeal revived a conflict, depublication is not a remedy.

According to the District, the anti-SLAPP context of this case makes a difference. That was an excuse offered by the Court of Appeal for reviving the conflict. (Opn. p. 29.) But it is not a good one. Faced with a worthy plaintiff who apparently has evidence to defeat an anti-SLAPP motion but cannot present the evidence in admissible form, the safety valve is the superior court's discretion to permit discovery under Code of Civil Procedure section 425.16, subdivision (g).

The District extols at length trial courts' power to make contextual evidentiary rulings. (Ans. pp. 5-8.) Supposedly this makes the Opinion unimportant. Nonsense. The Opinion holds that any former testimony that meets the statutory requirements

of a declaration escapes the former testimony rules of Evidence Code section 1290 et. seq. No contextual rulings are possible.

The cases cited in attempting to make the Opinion look correct are off-point. They all concern judicial notice of the record of a prior conviction to determine its nature and relevance, typically to sentencing. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082-1083; *People v. Lee* (2011) 51 Cal.4th 620, 650-651; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1349-1351.) *Miles* and *Lee* plainly do not involve former testimony. *Abarca* involves an authenticated official transcript of the defendant's admission at a plea hearing; it was not treated as testimony, and the court did not compare it to a declaration. (*Abarca*, 233 Cal.App.3d at pp. 1349-1350.)

2. The Petition Has Only One Issue: Former Testimony.

The purpose of pages 9 through 13 of the answer is incomprehensible. Gilbane and the joint venture seek review of a single evidentiary issue that was essential to the analysis and disposition in the Opinion. The prayer expressly requests remand to the Court of Appeal to decide the anti-SLAPP issues after a California Supreme Court decision on the former testimony issue. (Petn. p. 18 ["remand the case to the Court of Appeal to perform the second-prong anti-SLAPP analysis under the evidence principles elucidated in the California Supreme Court's opinion"].) In addition to complying with rules, the Statement of the Case in the petition merely emphasizes what should be clear from the Opinion itself: the outcome of the appeal very likely

depends on the evidentiary issue of which Gilbane and the joint venture seek review.

3. Conclusion

The answer is weightless. Review is essential to resolve a conflict in appellate decisions that will otherwise vex superior courts in what should be routine motion processing.

Respectfully submitted,

DENTONS US LLP

By Charles A. Bird

Attorneys for Gilbane Building Company and Gilbane/SGI a joint venture

Certificate of Compliance

I, Charles A. Bird, appellate counsel to Gilbane Building Company and Gilbane/SGI a joint venture, certify that the foregoing reply is prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the reply, the reply is 523 words long.

Charles A. Bird

PROOF OF SERVICE

Sweetwater Union High School District v. Gilbane Building Company, et al.,
Supreme Court Case No. S233526
Court of Appeal, Fourth Appellate District, Division One, Case No. D067383
San Diego Superior Court Case No. 37-2014-00025070-CU-MC-CTL

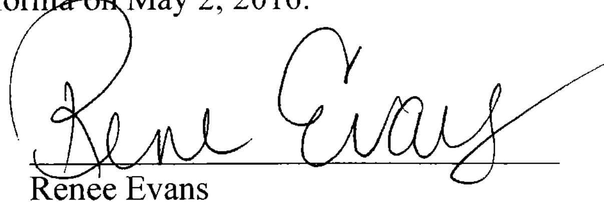
I, Renee Evans, declare as follows: I am employed with the law firm of Dentons US LLP, whose address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen years, and am not a party to this action. On May 2, 2016, I served the foregoing document described as:

REPLY SUPPORTING PETITION FOR REVIEW

[X] **U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at Dentons US LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

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

Executed at San Diego, California ~~on~~ May 2, 2016.



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