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

OPENING BRIEF ON THE MERITS

*Charles A. Bird (SBN 056566)
charles.bird@dentons.com
Christian D. Humphreys (SBN 174802)
Gary K. Brucker, Jr. (SBN 238644)
DENTONS US LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
619.236.1414

Attorneys for Gilbane Building Company et al.

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

---

OPENING BRIEF ON THE MERITS

---

*Charles A. Bird (SBN 056566)
charles.bird@dentons.com
Christian D. Humphreys (SBN 174802)
Gary K. Brucker, Jr. (SBN 238644)
DENTONS US LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
619.236.1414

Attorneys for Gilbane Building Company et al.

Table of Contents

Table of Authorities

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

1. Issue Presented.

Opposing petitioners' motion under Code of Civil Procedure section 425.16 (section 425.16 or the anti-SLAPP law), the Sweetwater Union High School District (District) proffered documents from a criminal prosecution of its former officials and citizens who allegedly bribed the officials with meals, entertainment, and political and charity contributions. These documents—indispensable to the District's opposition—consisted of narratives signed under penalty of perjury explaining guilty pleas, testimony to the grand jury, and records authenticated only by grand jury testimony. The superior court overruled petitioners' objections to the proffered materials. The Court of Appeal affirmed, treating the proffered materials as if they were declarations under oath made in the District's civil action against petitioners. Is testimony given in a criminal case by nonparties to a later civil case subject to Evidence Code section 1290 et. seq. setting conditions for receiving former testimony in evidence?

2. Statement of the Case.

The Supreme Court granted the petition of Gilbane Building Company (Gilbane) and Gilbane/SGI a joint venture (the joint venture) from the decision of the Court of Appeal, Fourth Appellate District, Division One, *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2016) 245 Cal.App.4th 19 (*Sweetwater*).

2.1. Procedural history and grounds for the Court of Appeal's decision.

Relying on Government Code section 1090 (section 1090), the District's complaint seeks to void completed construction management contracts it had with petitioners. (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 27.) The District claims four of its former officials were "interested" in the contacts because petitioners' representatives gave the officials lavish dinners, entertainment, travel, and " '[m]onetary contributions to beauty pageants, charities, and campaigns on behalf of District officials.' " (*Ibid.*)

Petitioners filed an anti-SLAPP motion. (*Sweetwater*, *supra*, 245 Cal.App.4th at pp. 27–28.) The District proffered the contested criminal-case documents in opposition to the motion. (*Id.* at p. 28.) Petitioners objected to the proffered materials. (*Id.* at p. 29.) The superior court denied the motion and later overruled the objections. (*Ibid.*) Petitioners timely appealed. (*Ibid.*)

The Court of Appeal affirmed. (*Sweetwater*, *supra*, 245 Cal.App.4th 19.) First, it affirmed the superior court's evidentiary rulings. (*Id.* at pp. 32–41.) Based on all the proffered documents, the court determined that the complaint arises from petitioners' protected petitioning activity, activity that is not illegal as a matter of law under *Flatley v. Mauro* (2006) 39 Cal.4th 299. (*Id.* at pp. 42–46.) The District therefore had the burden to establish the requisite probability of prevailing under section 425.16,

subdivision (b)(1), as elucidated in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89. (*Id.* at p. 46.)

The appellate court held the District met its burden to show probability of prevailing based on the contested criminal-case documents. (*Sweetwater*, *supra*, 245 Cal.App.4th at pp. 46–52.) "The evidence of the plea forms detailing the guilty and no contest pleas by various former [District] officials and former employees of defendants, as well as the grand jury testimony of a number of the individuals involved, is circumstantial evidence from which one could reasonably conclude that the gifts and contributions were made in order to sway the board members to vote in favor of awarding contracts to Gilbane and the Joint Venture." (*Id.* at p. 50.) The court reasoned that "[o]ne could reasonably infer" from the chronology of gifts and the District's board's actions that officials were influenced by the gifts to award contracts to petitioners (*Id.* at p. 51), and this was sufficient to create a reasonable inference of a "quid pro arrangement" (*Id.* at p. 50). The court therefore affirmed the order denying the motion. (*Id.* at p. 52.)

2.2. The uncontested evidence establishes only that the District and petitioners had a contractual relationship.

This subpart recites facts that are in the opinion of the Court of Appeal, but the opinion does not identify their source. Petitioners do not contradict the facts stated in the opinion.

2.2.1. The District engaged the joint venture to manage projects funded by voter-approved bonds.

In November 2006, District voters approved Proposition O. (1 AA 52.) The proposition authorized up to $644 million in bond sales with proceeds to be used to renovate and build schools. (1 AA 52, 248; 3 AA 607–620.)

With wide publication, the District requested proposals to manage construction of projects authorized under Proposition O. (1 AA 52, 248.) At the direction of Dr. Jesus Gandara,[1] District superintendent, no bidder was forbidden to have contact with District officials. (5 AA 1235, 1246.)

The District received seven timely proposals. (1 AA 248.) The joint venture authored one of them. (*Ibid.*) The District appointed a screening committee consisting of Ramón Leyba, chief operating officer; Katy Wright, director of planning; and Iva Butler, facilities accounting supervisor. (*Ibid.*) That panel concluded that all seven packages met the District's requirements. (*Ibid.*) Next, the District appointed an initial interview committee consisting of Leyba; Dianne Russo, chief financial officer; Wes Braddock, high school principal; Aerobel Banuelos, outside counsel; and Lou Smith, outside consultant. (*Ibid.*) That committee interviewed each team, rated them against a common set of requirements and objectives, and

[1] After the first mention of a person, he or she is referred to by last name only.

determined that three firms should return for final interviews. (*Ibid.*) The joint venture was one of the finalists. (*Ibid.*)

The District appointed a final interview committee consisting of Gandara, superintendent; Leyba; Banuelos; and Ralph Muñoz, capital project manager. (1 AA 248.) The committees determined that the joint venture was the "top applicant." (*Ibid.*) On that basis, Gandara sought Board authority to negotiate a contract with the joint venture. (*Ibid.*; see 1 AA 52; 3 AA 621, 625; 5 AA 1235.) Gandara is the only person connected with the competitive bidding process who is alleged to have been financially interested in the contracts at issue. (1 AA 55–59.) Despite the exacting process, Leyba and a former acting District superintendent criticized it in hindsight. (5 AA 1231–1232; see 1235–1236.)

In May 2007, the Board approved an Interim Program Management Agreement for the joint venture to provide management services for Proposition O projects. (1 AA 53, 66–85; 3 AA 627–628, 648, 652–671.) Trustees Pearl Quiñones, Arlie Ricasa, and Greg Sandoval participated in the decision. (*Ibid.*) In January 2008, the Board approved the Program Management Agreement for Proposition "O" Modernization Program for the joint venture to provide services for Proposition O work. (1 AA 53, 87–147, 163–223 [misplaced duplicate, as filed with superior court]; 3 AA 700, 711; 4 AA 717–777.) Quiñones, Ricasa, and Sandoval participated in the decision. (1 AA 53; 3 AA 700, 711.) The joint venture and the District amended the agreement in

May 2008, with Quiñones, Ricasa, and Sandoval participating in the decision. (4 AA 778, 787–788, 792–794.)

Related to the Proposition O services, in May 2007 the District contracted for the joint venture to take over and finish management services on projects funded under Proposition BB. (1 AA 54; 3 AA 648, 672–699.) Quiñones, Ricasa, and Sandoval participated in the decision. (*Ibid.*)

In April 2010, the District terminated for convenience the joint venture's Proposition O management agreement and contracted solely with Seville Group, Inc. (Seville), formerly a member of the joint venture, for the remaining services. (1 AA 55; 4 AA 795–796, 806, 813–817, 822–869.)

2.2.2. The joint venture performed under the contracts.

The joint venture successfully performed the contracts. So concluded an independent performance audit in March 2011. (2 AA 255–319.) The auditors stated the joint venture "demonstrated efficiencies in using state of the art accounting and document control systems" (2 AA 283) and "used innovative techniques and many best practices in school facility programming, design, preconstruction, construction, recordkeeping and technology to manage complex systems and construct state of the art facilities" (2 AA 319). Although the audit was not forensic (5 AA 1226–1230), contemporary financial auditing raised no concern about financial reporting integrity (see 2 AA 322, 330). The District received awards for its Proposition O projects. (2 AA 329, 333.)

The District paid the joint venture approximately $14.9 million for management services under the Proposition O contracts. (1 AA 54, 149–161, 227–228 ¶¶ 18–20; see 4 AA 879–896; 5 AA 1238–1240.) The District paid the joint venture approximately $2 million under the Proposition BB contract. (1 AA 55, 227–228 ¶¶ 18–20; see 4 AA 879–896; 5 AA 1238–1240.)

2.2.3. The pleas do not help the District show a probability of prevailing.

The Court of Appeal's decision does not rely on the pleas by District officials. (See *Sweetwater*, *supra*, 245 Cal.App.4th at p. 50.) The pleas provide the District no succor.

Quiñones (see *Sweetwater*, *supra*, 245 Cal.App.4th at pp. 26–27) pled to count 1 of the indictment, civil conspiracy violating Penal Code section 182, subdivision (a)(1) (2 AA 406). The conspiracy consisted of collectively violating Education Code section 35230, which prohibits offering valuable things to a member of a school board. (2 AA 345.) Each of the overt acts involved receiving meals or entertainment from Gary Cabello. (2 AA 345–346.) Cabello represented "Alta Vista and UBS," not petitioners. (2 AA 346.) Sandoval and Gandara (see *Sweetwater*, *supra*, 245 Cal.App.4th at pp. 26–27) pled to the same count (2 AA 411, 416).

Gandara pled to count 30 of the indictment, violating Government Code section 89503 by accepting more than the maximum gifts from one source in a year. (2 AA 416.) Count 30 dates the crime as March 11, 2008. (2 AA 354.) It does not

identify the source of the gifts.[2] (*Ibid.*) Quiñones pled to count 85 of the indictment, the same crime as count 30 but dated April 1, 2008. (2 AA 365, 406.) The text of the count is identical to Gandara's except for the date. (2 AA 354, 365.) Ricasa (see *Sweetwater*, *supra*, 245 Cal.App.4th at pp. 26–27) pled to count 120, the same crime as count 30 but dated March 27, 2009 (2 AA 373, 400). The text of the count is identical to Gandara's except for the date. (2 AA 354, 373.) Sandoval pled to count 142 of the indictment, the same crime as count 30 but dated March 28, 2008. (2 AA 377, 411.) The text of the count is identical to Gandara's except for the date. (2 AA 354, 377.)

Henry Amigable, a former employee of Gilbane (see *Sweetwater*, *supra*, 245 Cal.App.4th at pp. 27, 34) pled to "Count 17," violation of Education Code section 35230, offering a thing of value to a member of a governing board of a school district. (2 AA 388–391; 5 AA 1174–1177.) Amigable was not charged in the indictment. (2 AA 344.) The complaint against him neither contained a count 17 nor charged this crime. (2 AA 335–341, 344.) The indictment charged a count 17 for violation of Education Code section 35230 against Rene Flores (see *Sweetwater*, *supra*,

---

[2] The full text of the count states: "On or about March 11, 2008, [Gandara], being an officer of a local government agency did unlawfully, knowingly, and willingly, accept gifts from any single source in any calendar year with a total value of more than $250, said amount being adjusted each year pursuant to Government Code section 89503(f), in violation of Government Code section 89503(a)." (2 AA 354, capitalization adjusted.)

245 Cal.App.4th at p. 27), not Amigable.[3] (2 AA 351.) Assuming Amigable pled to the charge against Flores, the crime could have occurred any time between January 1, 2009 and December 31, 2011, could have involved any member of a governing body of any school district, and could have involved any contract with any party. (*Ibid.*) Amigable's employment with Gilbane ended in March 2009. (3 AA 477.) Nothing in the record suggests that the District was engaged in any contracting process with Gilbane or the joint venture between January 1, 2009 and March 2009.

Flores pleaded no contest to one misdemeanor count of aiding in a misdemeanor (Pen. Code, § 659), the misdemeanor being a violation of a disclosure requirement (Gov. Code, § 87203) in the Political Reform Act, Government Code section 87100 et seq. (2 AA 394–398; 5 AA 1179–1182.) That plea is categorically inadmissible. (Pen. Code, § 1016, subd, (3).)

The Quiñones, Sandoval, Ricasa, and Gandara pleas are irrelevant. Count 1 charges a conspiracy not involving petitioners. The alleged private sector wrongdoers are "Alta Vista and UBS" and their representative Cabello. (2 AA 346.) The counts charging violation of Government Code section 89503 cannot be connected to petitioners or even Amigable.

---

[3] The full text of count 17 states: "On or about and between January 1, 2009 and December 31, 2011, Jeffrey Steven Flores did unlawfully offer a valuable thing to a member of a governing board of a school district with the intent to influence his/her action in regard to the making of a contract to which the board of which he/she is a member is a party, in violation of Education Code section 35230." (2 AA 351, capitalization adjusted.)

Amigable's plea does not support a reasoned inference that a District official had an interest in a contract to which Gilbane or the joint venture was a party. During the short time within the charge that Gilbane employed Amigable, no relevant contracting process occurred. Neither Gilbane nor the joint venture is mentioned in the plea; a court must admit the plea narratives in evidence to make that connection.

2.3. The contested criminal-case evidence.

2.3.1. The contested documentary testimony was inadmissible as former testimony.

"There are, generally, four types of evidence that defendants contend the trial court erred in considering in opposition to their anti-SLAPP motion. Defendants argue that the plea forms detailing the guilty and no contest pleas entered by individuals who were criminally prosecuted in connection with the [District] contracts, as well as the factual narratives supporting those pleas, certain grand jury testimony, and documents presented to the grand jury, all constitute inadmissible hearsay, in that all of this evidence comprises out of court statements being offered for their truth." (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 33.)

The former testimony was not admissible under Evidence Code section 1291, which governs testimony offered against a party to the action in which it was given. The District failed to show—and could not show—that either "[t]he former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest

of such person; (*id.*, subd. (a)(1)) or "[t]he 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" (*id.*, subd. (a)(2)). (6 AA 1464-1468.) Petitioners neither offered any of the testimony on a former occasion nor were parties to any of the criminal proceedings with a right or opportunity to cross-examine any declarant. (*Ibid.*) The former testimony was not admissible under Evidence Code section 1292, which governs testimony offered against a stranger to the action in which it was given. The District failed to show that any of the declarants was unavailable as a witness. (*Id.*, subd. (a)(1); 6 AA 1464-1468.)

2.3.2. All the contested criminal-case evidence was given under oath or authenticated by contested testimony given under oath.

"A typewritten factual narrative was incorporated into each defendant's plea form as the factual basis for the plea. For example, the typewritten narrative incorporated into Amigable's plea form provides: 'Between March 9, 2007 and June 22, 2010 I provided gifts, meals and tickets to entertainment events directly to [Gandara], Superintendent, [Sandoval], elected Board member, [Ricasa], elected Board member, and [Quiñones], elected Board member, of the [District]. I provided the meals, tickets and gifts upon my initiative as sanctioned and encouraged by my employers. I also provided meals, tickets and gifts at the request of the elected board members and the Superintendant (sic). The

meals, tickets and gifts were made on behalf of my employers with the intent to influence the boards' decisions in granting construction contracts from the [District] to the firms for which I was working. My expenses were generated with the endorsement of my employers and they were reimbursed to me by my employers. At no time did the elected board members or Superintendent reimburse me or my employers for the meals, tickets or gifts I gave them on behalf of my employers.' " (*Sweetwater*, *supra*, 245 Cal.App.4th at pp. 34–35.)

"Similarly, the typewritten narrative incorporated into Sandoval's plea form provides: 'Government Code § 89503: I received, reviewed, understood and biannually voted on [the District's] conflict of interest code delineating the Form 700 reporting requirements sent to the [District] Board by the Superintendent. In 2008, I was an elected School Board Member for the [District]. I accepted gifts from [Amigable] of Gilbane in 2008 with a total value of more than $2,770 and I did not report them. The maximum amount of gifts one may receive from one source per year as of 2008 was four hundred twenty dollars ($420). [Amigable] provided these gifts with the intent to influence my vote on business awarded to Gilbane, his employer.' (Boldface omitted.)" (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 35.)

"Each plea form includes language to the effect that the individual entering the plea attests to the truth of the statements made in the plea under penalty of perjury and under the laws of

the State of California, and is signed and dated by that individual." (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 35.)

"[T]he transcripts of the grand jury testimony of Flores, Amigable, and former District representatives Wright, Leyba, Bruce Husson, Jaime Mercado, [Muñoz], and Jaime Ortiz, in opposition to defendants' anti-SLAPP motion . . . [are] inadmissible at trial unless they meet an exception to the hearsay rule, [but] the transcripts are of the same nature as a declaration in that the testimony is given under penalty of perjury." (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 38.)

The Court of Appeal did not separately analyze the documentary evidence from the grand jury proceedings because petitioners' objection was that those documents lacked authentication except in the plea forms, narratives, and grand jury testimony. (*Sweetwater*, *supra*, 245 Cal.App.4th at p. 41, fn. 24.)

2.3.3. Without narrating the facts, the Court of Appeal concluded that a reasonable juror could find a quid pro quo relationship.

The court did not narrate any of the testimony to which petitioners objected. Rather, it summarized: "The evidence of the plea forms detailing the guilty and no contest pleas by various former [District] officials and former employees of defendants, as well as the grand jury testimony of a number of the individuals involved, is circumstantial evidence from which one could reasonably conclude that the gifts and contributions were made in order to sway the board members to vote in favor of awarding

contracts to Gilbane and the Joint Venture." (*Sweetwater, supra,* 245 Cal.App.4th at p. 50.) A juror could reasonably infer a "quid pro arrangement." (*Ibid.*)

3. Affidavit-like Former Testimony Proffered on Motions Must Comply with the Hearsay Exception for Former Testimony.

The issue is of statutory interpretation. Petitioners believe complying with Evidence Code section 1292 is essential when a party proffers former testimony as evidence on a motion against an opposing party who was not engaged in the former proceeding, whether that former testimony was given in the form of an affidavit or otherwise under oath.

The rules of statutory interpretation are settled. "Our analysis begins with the text of this provision, as the statutory language is typically the best indication of the Legislature's purpose. [Citations.] We consider the ordinary meaning of the statutory language, its relationship to the text of related provisions, terms used elsewhere in the statute, and the overarching structure of the statutory scheme. [Citations.] When the language of a statutory provision remains opaque after we consider its text, the statute's structure, and related statutory provisions, we may take account of extrinsic sources—such as legislative history—to assist us in discerning the Legislature's purpose. [Citations.]" (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155–156.)

3.1. The text of Evidence Code section 1292 states that it applies in any hearing.

3.1.1. Affidavits are hearsay, and affidavits filed in prior cases are former testimony.

"Affidavits being hearsay may not be used in evidence except where permitted by statute. . . ." (*Rowan v. City & County of San Francisco* (1966) 244 Cal.App.2d 308, 314, fn. 3; accord, *Estate of Fraysher* (1956) 47 Cal.2d 131, 135.)

An affidavit is a form of testimony. (Code Civ. Proc., § 2002; see Civ. Code, § 14 ["every mode of oral statement, under oath or affirmation, is embraced by the term 'testify' "].) A declaration is an unsworn affidavit signed under penalty of perjury. (Code Civ. Proc., § 2015.5.) When an affidavit is proffered in an action other than the action in which it was originally given as testimony, it is former testimony: "As used in this article, 'former testimony' means testimony given under oath in: [¶] (a) Another action. . . ." (Evid. Code, § 1290.)

3.1.2. Former testimony—affidavits or otherwise—is inadmissible hearsay in motion hearings unless an exception makes it admissible.

The Court of Appeal theorized that the hearsay rule and former testimony standards could be applied only to trials. This errs.

The hearsay rule, Evidence Code section 1200, applies to any "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." (See Evid. Code, § 1202 [hearsay declarant's

credibility may attacked as if declarant testified "at the hearing"].) The District offered the contested criminal-case evidence against parties to a civil action who were not parties to the criminal case, so Evidence Code section 1292, subdivision (a) controls. It refers to parties in the position of petitioners as "the party against whom the testimony is offered has at the hearing." (Evid. Code, § 1292, subd. (a)[4].) " 'The hearing' means the hearing at which a question under this code arises, and not some earlier or later hearing." (Evid. Code, §145.) The language of sections 1200 and 1292, considered with the definition of "the hearing," has but one ordinary meaning: former testimony in the form of affidavits is inadmissible hearsay at a motion hearing unless section 1292 provides an exception.

Evidence Code section 1291 applies when the party against whom former testimony is offered was a party to the prior proceeding. By referring to the motive that party "has at the hearing" it confirms that former affidavit testimony is admissible at a motion hearing only if a hearsay exception applies. (Evid. Code, § 1291, subd. (a)(2).)

---

[4] Section 1292, subdivision (a) states in full: "Evidence of former testimony is not made inadmissible by the hearsay rule if: [¶] (1) The declarant is unavailable as a witness; [¶] (2) The former testimony is offered in a civil action; and [¶] (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."

Considering the Evidence Code as a whole, the Legislature repeatedly demonstrates it knows that hearing is a broad term, not a synonym for a trial. Evidence Code section 1290 defines former testimony as testimony given under oath in "[a]nother action or in a former *hearing or trial* of the same action. . . ." (Emphasis added.) Other statutes use both words. (Evid. Code, §§ 351.1 [exclusion of polygraph evidence], 1063 [hearing before trial about sealing at trial articles subject to protective order], 1128 [mentioning mediation is an irregularity at trial that may justify a new trial or further hearing]; 1228 [notice of intent to offer a statement of a child victim "prior to the hearing or trial"], 1350 [notice of intent to offer out-of-court statement by a witness made unavailable by a defendant charged with a serious felony], 1380 [similar], 1390 [foundational hearings related to § 1380], 1560 [production of business records at "trial, deposition, or hearing"].[5])

Some statutes are specific to trials. (Evid. Code §§ 703 [judge called as a witness in a jury trial], 704 [juror called as a witness at trial], 711 [witnesses must testify in the presence of parties], 712 [exception to § 711], 723 [limit on the number of expert witnesses at trial], 1601 [notice of intent to use abstract of title at trial].)

---

[5] Excluded from this survey are statutes that expressly or necessarily apply to preliminary hearings in criminal cases; the Legislature's differentiation of that specialized kind of hearing from a trial does not logically bear on its intent choosing language for sections applicable to civil cases or other aspects of criminal cases.

Other statutes apply expressly to hearings. (Evid. Code, §§ 402 [foundational hearings outside the presence of the jury] 769 [confronting a witness with an inconsistent statement], 770 [extrinsic evidence of inconsistent statement], 771 [refreshing a witness's memory], 780 [witness credibility], 782.1 [hearing about condoms outside the presence of the jury], 783 [hearing about sexual conduct outside the presence of the jury], 791 [previous consistent statements], 795 [§ 402 hearings for witnesses who have been hypnotized], 901 ["proceeding" for the purpose of invoking a privilege includes any hearing; no need to include the word "trial" in the definition], 1035.4 [hearing outside the presence of the jury on qualified privilege for sexual assault counseling], 1061 [evidentiary hearing is optional for trade secret protective orders], 1062 [in camera hearings on whether to close part of a criminal trial that would reveal a trade secret], 1103 [hearing outside the presence of the jury about evidence disparaging a crime victim], 1106 [similar to § 1103 for civil cases], 1109 [hearing under Evid. Code, § 352 on admissibility of other acts of domestic violence], 1235 [use of statements inconsistent with a witness's testimony], 1236 [use of prior consistent statements].)

The text does not allow an exception for motion hearings. Such an exception would not make sense; although motions normally are decided on papers, it is a matter of judicial discretion whether to allow live testimony. (*Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1120–1121.) The court should not impute to the Legislature an intent to make a discretionary

decision whether to hear live testimony control whether former affidavit testimony must pass the tests of Evidence Code section 1290, et seq.

The Court of Appeal used Code of Civil Procedure section 2009 to create a motions-only exception to the hearsay rule for documents containing former testimony. Section 2009 provides that "[a]n affidavit may be used . . . upon a motion. . . ."[6] The statute does not allow former testimony—in the form of affidavits, declarations, or surrogates—to be received in evidence over objection on motions. The fact that an affidavit was admissible on a motion in the case in which the affidavit was given does not make it admissible in some later case without testing under the hearsay rule. To the extent the affidavit statutes are relevant, they suggest a result opposite from the one reached by the Court of Appeal. Code of Civil Procedure section 2003 provides that "[a]n affidavit is a written declaration under oath, made without notice to the adverse party." That text at least implies the party against whom an affidavit is offered is the relevant adverse party when an affidavit is made.

---

[6] In full: "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute."

3.2. The history of the relevant statutes reinforces the message of the text.

Although text should resolve the appeal in petitioners' favor, petitioners do not fear the history of the relevant statutes.

3.2.1. The early statutes teach little.

The statutes regulating affidavits trace back to the 1872 Code of Civil Procedure. (Ann. Code Civ. Proc., § 2002 (1st ed. 1872, Haymond & Burch), p. 523 [affidavits as testimony]; *id.*, § 2003, p. 523 [definition of affidavit]; § 2009, p. 524 [uses of affidavits].) As today, nothing in the statutes impinges on whether former affidavits can be used without passing the former testimony test.

There was a statutory hearsay rule in 1872: "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions except in those few express cases in which . . . the declarations of others, are admissible. (Ann. Code Civ. Proc., § 1845 (1st ed. 1872, Haymond & Burch), p. 485; see *People v. Spriggs* (1964) 60 Cal.2d 868, 872 [treating the statute as embodying the hearsay principle].) There was also an exception for former testimony: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: [¶] . . . [¶] 8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter; . . ." (*Id.*, § 1870, pp. 490–491.) While "on a trial" might suggest something about using affidavits on a motion, the code did not authorize dispositive motions. (Ann. Code Civ. Proc.

(1st ed. 1872, Haymond & Burch) , p. 115 [no summary judgment statute]; *id.* at pp. 115–123 [no motion to strike except sham, irrelevant, and redundant matter, *id.*, § 453, p. 119] .) Issues of law were raised by demurrer and tried to the court. (*Id.* §§ 589, 591, p. 154.) Issues of fact were raised by a controverted complaint or new matter in an answer and tried to a jury unless the parties waived jury. (*Id.* §§ 590, 592, p. 154.)

When the Legislature authorized summary judgment motions, hearsay was inadmissible. (See, e.g., *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 95–96.)

In the days before the Evidence Code, the Legislature and the judiciary shared regulation of hearsay. (*In re Cindy L.* (1997) 17 Cal.4th 15, 27–28.) The history of that relationship, *ante*, shows no legislative intent to allow carte blanche filing of former affidavit testimony.

3.2.2. The history of the Evidence Code supports holding that former affidavit testimony must meet the Evidence Code test to be admissible on a motion.

The Evidence Code derives from the Law Revision Commission's study of the 1953 Uniform Rules of Evidence. (Tentative Recommendation and a Study Relating to the Uniform Rules of Evid. Article VIII. Hearsay Evidence (Aug. 1962), 4 Cal. Law Revision Com. Rep. (1963) 301, 307.) From the beginning, the Commission proposed language that recognized a distinction between a hearing and trial. (*Ibid.*, proposed change to rule 62(8).) For former testimony, the commission proposed a two-

section structure, one for testimony given in a prior proceeding between the parties and one for testimony offered against a person who was not a party to the prior proceeding. (*Id.* at pp. 314–315.) The proposals anticipated the final words of Evidence Code sections 1291 and 1292 by referring to offering the testimony "at the hearing." (*Ibid.*, see *id.* at p. 316 [using same language in explanatory note].) The tentatively proposed sections would supersede former Code of Civil Procedure section 1870, subdivision (8). (*Id.* at pp. 345–346.)

The Commission also adapted the definition of hearing from the Uniform Rules of Evidence. (Tentative Recommendation and a Study Relating to the Uniform Rules of Evid. Article I. General Provisions (Apr. 1964), 6 Cal. Law Revision Com. Rep. (1964) 1, 9.) The tentative language matches Evidence Code section 145; the Commission dropped "unless some other is indicated by the context of the rule where the term is used" from the model rule. (*Ibid.*)

When the Commission recommended the Evidence Code to the Legislature, it proposed Evidence Code section 145 as that statute now exists. (Recommendation Proposing an Evid. Code (Jan. 1965), 7 Cal. Law Revision Com. Rep. (1965) 1, 44 (Code Proposal).) And it expressly declared the breadth of the definition: "This definition is much broader than would be a reference to the trial itself; the definition includes, for example, preliminary hearings and post-trial proceedings." (*Ibid.*) And post-trial proceedings are motions. (See, e.g., Code Civ. Proc., §§ 629 [motion for judgment notwithstanding the verdict], 659

[motion for a new trial], 663a [motion to vacate judgment], 1021.4 [motion for attorney fees], 1021.5 [same], 1021.6 [same], 1021.7 [same], 1021.9 [same], 1038 [motion to recover defense costs].

The Commission's recommendations to regulate hearsay and former testimony are as the statutes were enacted. (Code Proposal, *supra*, 7 Cal. Law Revision Com. Rep. (1965) at pp. 221–223, 250–254.) The comments do not impinge on the breadth of the definition of hearing. (*Ibid.*) The recommendations for both Evidence Code section 1291 and Evidence Code section 1292 cross-refer to the definition of hearing in Evidence Code section 145. (*Id.* at pp. 253, 254.)

Taken all together, the Commission's work points a single direction: a motion hearing is a hearing, the hearsay rule applies in motion hearings, and former testimony in any form is admissible only if Evidence Code section 1291 or 1292 provides an exception.

3.3. Precedent does not support the Court of Appeal.

In *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, a panel of the Second Appellate District reversed a summary judgment by treating testimony from a prior criminal trial as admissible evidence. (*Id.* at pp. 148–149.) Without analysis, the court explained that "[w]hile the reporter's transcript is from another case, the effect of the examination made of Mr. Nolan is the same as would be a declaration supplied by him in this case." (*Id.* at p. 149.) In a footnote appended to that sentence, the court acknowledged the transcript could not be received over an

objection that it did not meet the conditions of Evidence Code section 1292 as former testimony. (*Id.* at p. 149, fn. 3.) But "inasmuch as the recorded testimony was offered in support of the opposition to a summary judgment motion and serves effectively as a declaration by Mr. Nolan, we treat it here as such." (*Ibid.*)

Here, the Court of Appeal relied entirely on *Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d at pp. 148–149, to affirm the superior court. (*Sweetwater*, *supra*, 245 Cal.App.4th at pp. 37–39.)

In *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 690, 693–697 (*Gatton*), a panel of the First Appellate District disagreed with *Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d 142. The *Gatton* court required the proponent of former testimony proffered in opposition to a summary judgment motion to comply with Evidence Code section 1292. (*Gatton*, 64 Cal.App.4th at p. 693.) It analyzed and sharply criticized *Williams*, commenting among other things: "We cannot abide *Williams's* disregard of the statute." (*Id.* at p. 694.) Anticipating a petition for rehearing asking for prospective operation of its rejection of *Williams*, the court stated: "*Williams* is a single, aberrant and unnoticed decision, not a well-rooted line of authority on which litigants could have placed reasonable reliance." (*Id.* at p. 696.) The First Appellate District concluded by reiterating "[w]e reject *Williams*" and affirming summary judgment because the only opposing evidence—the former testimony—was inadmissible. (*Id.* at p. 697.)

Another panel of the Second Appellate District rejected its own district's *Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d 142 opinion and followed *Gatton*, *supra*, 64 Cal.App.4th 688. (*L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1347–1348 (*L&B*).)

Here, the Court of Appeal acknowledged the conflict of decisions and reached back to *Williams v. Saga Enterprises, Inc.*, *supra*, 225 Cal.App.3d 142 to affirm the superior court. (*Sweetwater*, *supra*, 245 Cal.App.4th at pp. 38–42.) The court did not address *Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 899, which holds specifically that former testimony to a grand jury is inadmissible hearsay unless an exception applies.

The reality of superior court practice is reflected in *Gatton*, 64 Cal.App.4th at p. 693, *L&B*, *supra*, 67 Cal.App.4th at pp. 1347–1348, and *Williams v. Hartford Ins. Co.*, *supra*, 147 Cal.App.3d at p. 899. But none of the cases analyzes statutory text or history deeply.

3.4. The Legislature would not have made a policy choice to adopt the Court of Appeal's rule, and no court should do so.

For motion practice, the Court of Appeal eradicated the former testimony statutes, principally Evidence Code section 1290, et seq. It would not have made sense for the Legislature to do so. The Court of Appeal's invention of a statutory construction also violated the Legislature's prerogative to regulate exceptions to the hearsay rule, a function recognized by the Supreme Court and vital because of the need for nuanced drafting.

3.4.1. Former testimony, carte blanche, should not be thrust on superior courts deciding motions.

The Court of Appeal's opinion requires superior courts to receive any former statement under oath as the equivalent of a declaration. (*Sweetwater, supra,* 245 Cal.App.4th at pp. 15–30.) It specifically compels receiving plea narratives and grand jury testimony in a civil case, although the criminal defendants and grand jury witnesses are not parties to the civil case, and the parties to the civil case were not prosecuted. (*Id.* at pp. 27–28, 33–34.)

Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142, revived by the Fourth District, requires superior courts specifically to receive testimony given in a civil trial by a person who is not a party to the action in which the former testimony is proffered. This is so regardless of whether the former testimony was impeached, contested, or disbelieved by the trier of fact. *Gatton, supra,* 64 Cal.App.4th at p. 690 involved an excerpt from a 10-year-old civil-case deposition. *L&B, supra,* 67 Cal.App.4th at p. 1347, involved testimony in a criminal trial given by a nonparty to the civil action. The Court of Appeal's invention would allow the trial bar to thrust upon superior courts every imaginable form of former testimony. After all, this record contains ex parte testimony that nobody could cross-examine and affidavit-surrogates and allocutions that neither a prosecutor nor defense counsel had any motive to cross-examine. Collectively, this is the least reliable basket of former testimony imaginable.

Neither the party making the proffer nor the party's lawyer need have had any contact with the declarant of the former testimony.

No showing need be made that the declarant is available or unavailable, alive or dead, competent or demented.

The former testimony may be an exculpation of civil or criminal liability that the judge or jury rejected. Objections to it may have been sustained. It may have been struck entirely. No matter, the burden shifts to the other party to find the records of the case in which the testimony was given and show the court that the ersatz declaration is filled with sawdust.

3.4.2. The Supreme Court correctly defers hearsay innovation to the Legislature.

Innovating a motions-only exception to the hearsay rule is not a proper judicial function. The Federal Rules of Evidence contain a residual exception to the hearsay rule (Fed. Rules Evid., rule 807), but the Evidence Code does not (*In re Cindy L.*, *supra*, 17 Cal.4th at pp. 27–28; see Evid. Code, § 1201). Given the Legislature's extensive regulation of exceptions for prior testimony (see, e.g., Evid. Code, §§ 1290, 1291, 1292, 1293, 1294; Code Civ. Proc., § 2025.620), courts should resist making any exceptions and "may not create evidentiary exceptions in conflict with statute" (*In re Cindy L.*, 17 Cal.4th at p. 28).

If former testimony should be available as evidence on motions when it would not be admissible at trial, the Legislature should write a new statute to achieve that result under appropriate conditions. To illustrate, the proponent under the

federal residual exception must establish a foundation that the statement has guarantees of trustworthiness equivalent to those that undergird specific exceptions to the hearsay rule. (Fed. Rules Evid, rule 807(a)(1).) Merely being under oath provides no such guarantee unless the foundation establishes facts including that the testimony was received, was not struck, and was not rejected by the trier of fact.

The federal proponent must show the proffered statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." (Fed. Rules Evid, rule 807(a)(3).) An available witness's current testimony given in the context of the specific case is usually more probative than former testimony given in another matter. Receiving the hearsay must "best serve . . . the interests of justice." (*Id.*, rule 807(a)(4).) And the proponent must give the "adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it." This will almost never be so when former testimony is offered in opposition to a motion. (See Code Civ. Proc., § 1005, subd. (b) [opposing papers filed nine court days before hearing, reply papers filed four court days later].)

The Court of Appeal ignored the wisdom of *In re Cindy L.*, *supra*, 17 Cal.4th at p. 28, and bungled into a field that, if in need of change, requires nuanced statutory drafting. The importance of this error requires correction by the Supreme Court.

4. Conclusion.

The Supreme Court should reverse the decision of the Court of Appeal with a clear holding that Code of Civil Procedure section 2009 does not authorize receiving in evidence documents that are not declarations in the matter before the court but instead contain former testimony from other cases. It should then remand the case to the Court of Appeal to perform the second-prong anti-SLAPP analysis under the evidence principles elucidated in the Supreme Court's opinion.

Respectfully submitted,

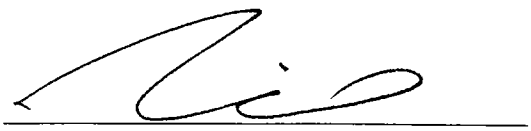
DENTONS US LLP

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 brief 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 brief, the brief is 7,055 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 August 8, 2016, I served the foregoing document described as:

OPENING BRIEF ON THE MERITS

[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 August 8, 2016.

Renee Evans

Renee Evans

SERVICE LIST

John S. Moot, Esq. Sarah B. Evans, Esq. Kristen M. Johnson, Esq. SCHWARTZ SEMERDJIAN CAULEY & MOOT LLP 101 West Broadway, Suite 810 San Diego, CA 92101 Tel.: 619.236.8821 Fax: 619.236.8827 Email: johnm@sscmlegal.com sarah@sscmlegal.com kristenb@sscmlegal.com	*Attorneys for Plaintiff and Respondent Sweetwater Union High School District*
Court of Appeal Fourth District, Division 1 750 B Street, Suite 300 San Diego, CA 92101	
Superior Court of the State of California Hon. Eddie Sturgeon 330 W. Broadway Department 67 San Diego, CA 92101	

93385157\V-1