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ORDER OF SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW (SEPTEMBER 15, 2021)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA

CAHILL CONSTRUCTION COMPANY,

v.

S.C. (RICHARDS) DIVISION SF.

Case Number S270137

Petition for review denied

OPINION OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION FIVE (JULY 19, 2021)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

CAHILL CONSTRUCTION COMPANY, INC., ET AL.,

Petitioners,

v.

THE SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent.

EDWARD RICHARDS ET AL.,

Real Parties in Interest.

No. A162885

(Alameda County Super. Ct. No. RG21088294)

Before: RODRIGUEZ, Judge., BURNS, Judge., NEEDHAM, Acting P.J.

Code of Civil Procedure section 2025.295 caps the amount of time a plaintiff may be deposed when two conditions are met: first, the civil action must be "for injury or illness that results in mesothelioma" (*id.,* subd. (a)); and second, a licensed physician must declare the plaintiff "suffers from mesothelioma . . . , raising substantial medical doubt of the survival of the [plaintiff] beyond six months."[1] (*Ibid.*) If both conditions are met, "a deposition examination of the plaintiff by all counsel, other than the plaintiffs counsel of record, shall be limited to seven hours of total testimony." (*Ibid.*) But the statute permits a trial court to grant up to an additional seven hours– "for no more than 14 hours of total deposition conducted by the defendants"—if more than 20 defendants appear at the deposition, the court determines that the additional time is warranted in the interest of fairness, and the additional time does not appear to endanger the plaintiffs health. (*Id.,* subds. (b)(2), (c).)

Cahill Construction Company, Inc.'s petition for writ of mandate presents an issue of first impression: may a trial court grant deposition time in excess of the 14-hour cap set forth in section 2025.295, subdivision (b)(2)?[2] The answer—based on the unambiguous

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[1] Undesignated statutory references are to the Code of Civil Procedure. These conditions also apply to silicosis.

[2] Additional petitioners are Cahill Contractors, Inc.; Foster Wheeler LLC; Fryer-Knowles, Inc.; Nibco Inc.; O'Reilly Auto Enterprises, LLC; and Swinerton Builders. We refer to petitioners collectively as Cahill. We refer to all defendants, including the 98 additional defendants who are not parties to this writ proceeding, collectively as defendants. We take judicial notice of legislative history materials for section 2025.295. (*Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 767, fn. 8.)

language of section 2025.295 and the evident legislative purpose underlying its enactment—is no. Indeed, the arguments advanced by Cahill are identical to those considered, and rejected, by the Legislature when it enacted section 2025.295. Other Code of Civil Procedure provisions addressing a court's right to control discovery do not alter our conclusion. Nor are we persuaded that section 2025.295's limitation on deposition time violates Cahill's due process rights under the federal Constitution.

We deny the writ petition.

BACKGROUND

In early 2021, Edward and Linda Richards (collectively, plaintiffs) filed a lawsuit against 105 defendants, including Cahill. The complaint includes 11 causes of action arising out of Richards's alleged asbestos exposure and seeks compensatory and punitive damages. The trial court granted trial preference based on a declaration from Richards's treating physician that Richards, then 72 years old, was suffering from mesothelioma and had a life expectancy of fewer than six months. Trial is set to begin in August.

Defendants propounded written discovery to plaintiffs. Plaintiffs' voluminous responses to standard interrogatories identified numerous products, job sites, and employers that plaintiffs claimed were responsible for Richards's exposure to asbestos during his 30-year career as a pipefitter. Plaintiffs provided defendants with the transcript of Richards's prior deposition, taken in asbestos litigation involving Richards's co-worker, during which Richards was questioned about his work history and familiarity with asbestos-containing pro-

ducts. They also produced Richards's employment records.

Thereafter, plaintiffs noticed Richards's deposition. Cahill moved for a protective order under section 2025.420 to extend the presumptive seven-hour limit provided for in section 2025.295, subdivision (a).[3] Based on section 2025.295, subdivision (b)(2), the court granted defendants a total of 14 hours to depose Richards. Pursuant to subdivision (c) of the statute, the court determined that giving defendants more than seven hours to depose Richards did not appear to endanger his health and the number of defendants militated in favor of allowing them "the maximum permissible period in which" to depose Richards. But the court declined to grant defendants more than 14 hours. Section 2025.295, the court concluded, imposed a "'clear cap'" of 14 hours of total deposition conducted by defense counsel and "eliminated" the court's discretion to exceed that cap when a physician attests the plaintiff has mesothelioma and declares a substantial medical doubt of the plaintiff's survival beyond six months.

Plaintiffs' counsel deposed Richard for between eight and nine hours. Approximately 80 to 90 defendants appeared at the deposition. Defendants deposed Richards for 14 hours. During that time, defendants jointly questioned Richards "regarding issues relevant

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[3] Section 2025.420 authorizes a trial court to issue a protective order "[b]efore, during, or after a deposition." (*Id.,* subd. (a).) For good cause shown, 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." (*Id.,* subd. (b).)

to all of them" and each defendant briefly questioned Richards as to its own particular product or conduct.

After defendants' deposition concluded, Cahill renewed its protective order motion, arguing the cap on deposition time deprived defendants of the ability to effectively depose Richards and prepare for trial. To support this argument, Cahill offered declarations from defense counsel and excerpts from Richards's deposition transcript. Plaintiffs opposed the motion. They highlighted the availability of other discovery methods and the uncontroverted evidence that further deposition would endanger Richards's health.[4]

A different judge heard the renewed motion and denied it. In a thorough written order, the court concluded a trial court retains "limited discretion" under section 2025.295 to lengthen a deposition beyond 14 hours. Referring to section 2025.420, the court observed "other provisions of the Discovery Act empower the Court to prevent gamesmanship and sanction able conduct in deposition, like bullying or improper coaching, and to provide a remedy for such gamesmanship that could include additional deposition time."

But the court declined to exercise its "limited discretion," concluding additional deposition time in excess of the section 2025.295 cap was "not warranted by the facts of the case." It found the deposition transcript was free of "gamesmanship" or "questionable conduct"—such as repeated and frivolous speaking

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[4] At the time they moved for a protective order, defendants had not deposed Richards's wife or his former employers, nor taken any percipient witness depositions.

objections or evasive answers—that might warrant a protective order under section 2025.420. It also opined defense counsel "cover[ed] a substantial amount of ground" during common questioning and noted Cahill had failed to show other discovery methods, including depositions of percipient witnesses and contention interrogatories, were inadequate to prepare for trial.

The court also rejected Cahill's due process argument. It questioned whether a party had a constitutional right to discovery in general, or depositions in particular, and then held section 2025.295 "passe[d] muster" under the federal Constitution. The court concluded that in enacting section 2025.295, the Legislature deemed it appropriate to limit deposition time for a "small class of terminally ill witnesses." The court posited a reasonable layperson might reach the same conclusion. Finally, the court opined the statute complied with "'fundamental principles of fairness and decency.'" It certified its ruling for interlocutory appeal (§ 166.1).

This writ petition followed. We issued an order to show cause to consider the novel statutory questions outlined in the trial court's certification and other issues pressed in the petition.[5] *(Paul Blanco's Good Car Company Auto Group v. Superior Court* (2020) 56 Cal.App.5th 86, 99.) Writ review is appropriate because the petition presents questions of first impression "of general importance to the trial courts and to the profession" that are amenable to the issuance of "general guidelines . . . for future cases." (*Oceanside Union School Dist. v. Superior Court* (1962)

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[5] Mindful of the rapidly approaching preferential trial date, we expedited briefing and oral argument.

58 Cal.2d 180, 185-186, fn. 4.) The need for writ review is further demonstrated by the fact that two judges in the same superior court reached conflicting interpretations of the statute. (*Zembsch v. Superior* Court (2006) 146 Cal.App.4th 153, 161, fn. 4.) Additionally, Cahill made an adequate showing that it lacked adequate remedies at law and would suffer irreparable harm absent writ review. *(Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 299-300.)

DISCUSSION

A. Construction of Section 2025.295

Well-settled principles guide our interpretation of the statute. "Our fundamental task is to ascertain the Legislature's intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning. [Citation.] We examine that language in the context of the entire statutory framework to discern its scope and purpose and to harmonize the various parts of the enactment. [Citation.] 'If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.] The wider historical circumstances of a law's enactment may also assist in ascertaining legislative intent, supplying context for otherwise ambiguous language." (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 168-169.) "The interpretation of a statute presents a question of law that this court reviews de

novo." (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.)

A party in a civil proceeding has a statutory right to conduct discovery. (§ 2017.010, subd. (a).) One way a party "may obtain" that discovery is by taking an oral deposition. (§ 2019.010, subd. (a).) Until 2019, section 2025.290 governed the length of depositions in cases like the one at issue here. (Stats. 2012, ch. 346, § 1.) That statute limits the deposition of a witness by counsel other than the witness's counsel to "seven hours of total testimony" but also requires the court to "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." (§ 2025.290, subd. (a).) Subdivision (b) excepts complex cases, unless a "licensed physician attests in a declaration . . . that the deponent suffers from an illness or condition that raises substantial medical doubt of survival of the deponent beyond six months." (*Id.,* subd. (b)(3).) In that instance, the statute limits deposition by counsel other than the witness's counsel to "14 hours of total testimony." (*Ibid.*) Subdivision (c) provides that the statute does not "affect the existing right of any party to move for a protective order or the court's discretion to make any order that justice requires to limit a deposition in order to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, undue burden, or expense." (*Id.,* subd. (c).)

Certainteed Corp. v. Superior Court (2014) 222 Cal.App.4th 1053 (*Certainteed*) interpreted section 2025.290 to permit depositions to exceed subdivision (b)(3)'s 14-hour limit "if additional time is 'needed to

fairly examine the deponent.'" (*Certainteed,* at p. 1061.) *Certainteed* held "section 2025.290 not only authorizes the court to allow additional time to depose a witness in these circumstances, but *requires* it to do so unless the court, in its discretion, determines that the deposition should be limited for another reason." (*Id.* at p. 1062, italics added, citing § 2025.290, subd. (c).) Under *Certainteed,* a trial court is authorized—and indeed obligated—to extend the deposition of a terminally-ill plaintiff beyond 14 hours when the defendant shows "additional time [is] needed to fairly examine" the plaintiff. (*Certainteed,* at p. 1061.)

The Legislature changed the law—and responded to *Certainteed—by* adding section 2025.295 in 2019. (Stats. 2019, ch. 212, § 1.) Effective January 1, 2020, section 2025.295, subdivision (a) provides: "Notwithstanding Section 2025.290, in any civil action for injury or illness that results in mesothelioma . . . , a deposition examination of the plaintiff by all counsel, other than the plaintiff's counsel of record, shall be limited to seven hours of total testimony if a licensed physician attests in a declaration served on the parties that the deponent suffers from mesothelioma . . . , raising substantial medical doubt of the survival of the deponent beyond six months."

Subdivision (b) provides: "Notwithstanding the presumptive time limit in subdivision (a), upon request by a defendant, a court may, in its discretion, grant one of the following up to: [¶] (1) An additional three hours of deposition testimony for no more than 10 hours of total deposition conducted by the defendants if there are more than 10 defendants appearing at the deposition[;] [¶] (2) An additional seven hours of deposition testimony for no more than 14 hours of

total deposition conducted by the defendants if there are more than 20 defendants appearing at the deposition." Subdivision (c) provides that the "court may grant the additional time" under subdivision (b) "only if it finds that an extension, in the instant case, is 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."

In construing section 2025.295, we begin with the words of the statute. Subdivision (a) states that "[n]otwithstanding [s]ection 2025.290," the deposition of a terminally-ill mesothelioma plaintiff by counsel other than plaintiff's own counsel "shall be limited to seven hours of total testimony." The Legislature's use of the word "notwithstanding" means, with regard to this narrow class of individuals, the statute supplants section 2025.290, the language of which *Certainteed* had interpreted as authorizing a deposition in excess of 14 hours.

Section 2025.295, subdivision (b)(2) provides that, "[n]otwithstanding the presumptive time limit in subdivision (a)," the court "may, in its discretion, grant . . . *up to:* [¶] . . . [¶] . . . [a]n additional seven hours of deposition testimony *for no more than* 14 hours of total deposition conducted by the defendants if there are more than 20 defendants appearing at the deposition." (Italics added.) Merriam-Webster's dictionary defines the prepositional phrase "up to" as a "function word to indicate a limit or boundary." (Merriam-Webster Dict. Online (2021) <https://merriam-webster.com/dictionary/upto> [as of July 19, 2021].) The ordinary meaning of "no more than" is "a stated

number or fewer." (Merriam-Webster Dict. Online, *supra,* <https://merriam-webster.com/dictionary/no more than> [as of July 19, 2021].) The language of subdivision (b)(2) is clear and unambiguous: a trial court has discretion to grant up to—but no more than-14 hours for defense counsel to depose a terminally-ill mesothelioma plaintiff.

Cahill argues section 2025.295 does not preclude a trial court from granting defendants more than 14 hours when additional time is "justified," such as when the plaintiff has a lengthy history of alleged asbestos exposure and a large number of defendants appears at the deposition. Not so. Cahill's interpretation contravenes the statute's plain language and renders the phrase "for no more than" meaningless. Had the Legislature wanted to provide the trial court with discretion to increase the time limit beyond 14 hours, it could have done so—such as it did in section 2025.290. It did not. We cannot "'rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.'" (*Kaanaana v. Barrett Business Services, Inc., supra, 11* Cal.5th at p. 171.) Moreover, "courts are without power to expand the methods of civil discovery beyond those authorized by statute." *(Holm v. Superior Court* (1986) 187 Cal.App.3d 1241, 1247.)

Cahill's argument also ignores the Legislature's stated purpose in enacting section 2025.295, which was to "protect dying mesothelioma . . . victims by limiting cross-examination in a deposition" to 14 hours. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 645 (Reg. Sess. 2019-2020) as amended July 5, 2019, p. 4 (Sen. Rules Com.).) The statute was a direct response to *Certainteed,* which interpreted

section 2025.290, subdivision (b)(3) to authorize depositions in excess of 14 hours: the Legislature expressed concern that the *Certainteed* rule was being used to allow "marathon depositions" that were inflicting "undue emotional and physical harm on victims during their final days of life—even hastening death." (Sen. Rules Com., at pp. 4, 5-6.) Section 2025.295 thus placed a "tight limit on the length of deposition testimony, affording courts discretion to extend . . . *up to 14 hours of total deposition* where there are more than 20 defendants." (Sen. Rules Com., at p. 6, italics added; Sen. Com. on Judiciary, Analysis of Sen. Bill No. 645 (2019-2020 Reg. Sess.) Apr. 2, 2019, p. 7 ["[t]his bill places a tight limit on the length of deposition testimony, affording courts *discretion only* to extend" to the provided for cap] (Sen. Com. on Judiciary), italics added.)

When the bill was introduced, the Legislature acknowledged "asbestos litigation is generally highly complex and involves numerous defendants." The Legislature considered several factors, including whether the proposed deposition length would be "sufficient in cases with dozens of defendants," the importance of deposition testimony in asbestos litigation, and the availability of other methods of discovery. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 645 (Reg. Sess. 2019-2020) June 4, 2019, pp. 6-8.) But the Legislature also expressed concern that existing law governing depositions was being "utilized as a tool to stall litigation or needlessly harass plaintiffs." (*Id.* at p. 1.) Moreover, the Legislature considered, and rejected, the very arguments Cahill makes here: that the cap on defense deposition length unfairly limited cross-examination and that the bill violated a

defendant's due process rights. (Sen. Com. on Judiciary, *supra,* pp. 6-7.) The Legislature ultimately settled on a "clear cap" of 14 hours (Sen. Rules Com., *supra,* at p. 4) and "narrowly aimed" the legislation "at only those deponents whose time is in short supply, and [for whom] special consideration is arguably warranted." (*Id.* at p. 6.) The Legislature concluded the statute "provide[d] a reasonable limitation on deposition testimony in a narrow subset of cases based on documented and extremely critical health concerns." (*Ibid.)*

In sum, the unambiguous statutory language and the legislative history unquestionably demonstrate the Legislature's purpose in enacting section 2025.295 was to impose strict time limits on a small class of depositions, eliminate a trial court's discretion to exceed the 14-hour cap, and thereby protect a uniquely vulnerable population.

B. Section 2025.420

Cahill's reliance on section 2025.420, which authorizes a trial court to issue a protective order to control deposition conduct, does not persuade us that courts have the authority to grant additional deposition time in excess of the 14-hour limit imposed by section 2025.295. Section 2025.420, subdivision (b) provides a nonexhaustive list of orders that may be issued, such as that "the deposition not be taken at all," or that "the scope of the examination be limited to certain matters." (*Id.,* subd. (b)(1), (b)(10); *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal. App.4th 261, 316.) The statute does not explicitly allow deposition time in excess of statutory limits, and Cahill cites no case law supporting such a construction.

(Upshaw v. v. Superior Court (2018) 22 Cal.App.5th 489, 504, fn. 7.)

Even assuming section 2025.420 gives courts the power to grant additional deposition time, the more specific and later enacted statute—section 2025.295—prevails. *(Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634.) And, unlike section 2025.290, which explicitly disclaimed any intent to affect a party's ability to seek a protective order, section 2025.295 contains no such language. Moreover, the Legislature was aware of section 2025.420 when it enacted section 2025.295, yet it made no mention of the protective order statute when discussing the strict time limits it was considering, a further indication the Legislature did not intend to permit a party to use section 2025.420 to circumvent the cap on deposition time. (Sen. Com. on Judiciary, *supra,* p. 2; Sen. Rules Com., *supra,* p. 1; *see Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 309.) The foregoing demonstrates the Legislature intended to enact a hard 14-hour cap on this class of depositions, brooking no exception.

C. Due Process Challenge

Cahill concedes section 2025.295 is facially valid but contends it is unconstitutional as applied because the statute violates Cahill's rights to "due process and confront witnesses" under the federal Constitution. "A person's right of cross-examination and confrontation of witnesses against him in noncriminal proceedings is a part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment to the federal Constitution, where there is involved a threat to life, liberty or property." (*August v. Department of Motor Vehicles* (1968) 264 Cal.App.2d

52, 60.) In civil proceedings, "'[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency. The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure.'" *(People v. Bona* (2017) 15 Cal.App.5th 511, 520.)

An as-applied challenge "'contemplates analysis of the facts of a particular case . . . to determine the circumstances in which the statute . . . 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.' [Citation.] When reviewing an as-applied constitutional challenge on appeal, we defer to the superior court's findings on historical facts that are supported by substantial evidence and then independently review the constitutionality of the statute under those facts." *(California Advocates for Nursing Home Reform v. Smith* (2019) 38 Cal.App.5th 838, 840.)[6]

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[6] Cahill does "not dispute [the trial court's] finding that [s]ection 2025.295 survives a *facial* constitutional challenge." As it did below, however, Cahill "appear[s] to blend the concepts of facial and as-applied constitutional challenges" in its briefing. Moreover, with regard to its as- applied argument, Cahill does not acknowledge "the standard of review, in and of itself a potentially fatal omission." (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948.) Cahill cites *Tobe v. City of Santa* Ana (1995) 9 Cal.4th 1069, but that case does not assist petitioners. There, the "plaintiffs did not clearly allege" an as-applied "challenge or seek relief from specific allegedly impermissible applications of the ordinance." (*Id.* at p. 1083.) The California Supreme Court held that even "assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance was applied in a constitutionally impermissible manner." (*Ibid.*)

Here, in denying Cahill's request for a protective order, the court found the statutory cap did not prevent defendants from effectively participating in the deposition. Substantial evidence supports that finding. The record demonstrates defense counsel "cover[ed] a substantial amount of ground" during common questioning and that each defendant also conducted individual questioning. The court also found the statute did not prevent defendants from taking advantage of the myriad other forms of discovery available to them, including depositions of percipient witnesses and contention interrogatories to plaintiffs. Substantial evidence supports that factual finding. In light of these findings, Cahill's as-applied challenge to the statute fails.[7]

Cahill has not persuasively argued otherwise. Instead, Cahill highlights the inequity in allowing plaintiffs' counsel unlimited time to depose the plaintiff while placing an "inflexible cap" on defense deposition. That argument is relevant to a facial challenge rather than an as-applied one. And, while it may have some

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[7] This court's decision to entertain writ review of Cahill's novel as-applied due process challenge to section 2025.295 should not be understood to dictate that appellate courts will grant writ review of future trial court rulings on this subject. (*Oceanside Union School Dist. v. Superior Court, supra,* 58 Cal.2d at pp. 185-186, fn. 4.) Establishing that an aggrieved petitioner lacks other adequate remedies at law and will suffer irreparable harm from an adverse determination on such a due process claim is inherently difficult for a variety of reasons, including the ongoing nature of discovery proceedings, the availability of a myriad of discovery tools other than depositions, the possibility of defendants developing other evidence that may mitigate any lost opportunities caused by a restriction on one discovery tool, and the potential for defendants to cross-examine plaintiff at trial.

logical appeal, the Legislature decided otherwise. The time disparity in this case does not render the statute unconstitutional as applied to Cahill. In enacting the statute, the Legislature considered—and rejected—the argument Cahill makes here and found the statute "provide[d] a reasonable limitation on deposition testimony in a narrow subset of cases based on documented and extremely critical health concerns." (Sen. Rules Com., *supra,* at p. 6.) The Legislature also noted that "[d]epositions are only one of the many tools available in discovery. For example, interrogatories can provide access to much of the same information defendants seek in extended depositions and provide it in a timelier, more efficient, and not excessively redundant manner that does not overly tax the health of a dying patient. If a plaintiff does not adequately respond to such interrogatories, there are mechanisms for defendants to compel further responses." (*Ibid.*)

We hold section 2025.295 sufficiently comports with principles of fairness and decency and reject Cahill's as-applied challenge to the statute.

DISPOSITION

The petition for writ of mandate is denied. This decision will become final as to this court three days after its filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).) Plaintiffs are entitled to recover costs. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

Rodriguez., J.*

WE CONCUR:

Needham, Acting P.J.

Burns, J.

Cahill Construction Co. Inc. v. Superior Court (Alameda County) (A162885)

Trial Court: Alameda County

Trial Judges: Hon. Jo-Lynne Q. Lee and
Hon. Michael Markman

Attorneys:

Hugo Parker, Edward R. Hugo, James C. Parker, Tina M. Glezakos, Alex G. Taheri, Bina Ghanaat for Petitioners.

Arkin Law Firm, Sharon J. Arkin; Keller, Fishback, & Jackson, Stephen M. Fishback, Daniel L. Keller for Real Parties in interest.

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

ORDER OF SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (JUNE 15, 2021)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
RENE C. DAVIDSON ALAMEDA
COUNTY COURTHOUSE

RICHARDS,

Plaintiff/Petitioner(s),

v.

3M COMPANY,

Defendant/Respondent(s).

No. RG21088294

Motion for Protective Order Denied

Before: Michael M. MARKMAN, Judge.

The Motion for Protective Order filed for Swinerton Builders and O'Reilly Auto Enterprises, LLC and NIBCO INC and Fryer-Knowles INC, A Washington Corporation and Cahill Construction CO INC was set for hearing on 06/15/2021 at 10:00 AM in Department 18 before the Honorable Michael M. Markman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

Mr. Richards has pleural mesothelioma. He worked for more than thirty years as a pipe fitter with many different asbestos-containing products. In their Complaint, filed January 29, 2021, Plaintiffs name more than 100 different defendants. According to the Moving Defendants, between 80 and 92 defendants appeared at Mr. Richard's deposition.

Notwithstanding their numbers, the defendants were limited to fourteen hours of examination time. The limit is due to a "clear cap" of 14 hours of deposition cross-examination, imposed by a new statute passed by the California Legislature. The limit applies where a licensed physician has declared a deponent suffers from mesothelioma and there is substantial medical doubt of the survival of the deponent beyond six months. (Cal. Code Civ. Proc. § 2025.295 ["Section 2025.295"].) Sadly, Mr. Edwards falls into that category.

Defendants Cahill Construction Company, Inc., et al. ("Cahill") and ABCO Mechanical Contractors, Inc. et al's ("ABCO") (Cahill and ABCO are collectively "Moving Defendants") contend that the new and strict time limit violates the due process guarantees of the United States Constitution, as incorporated to our state through the Fourteenth Amendment, and of the California Constitution. Moving Defendants, joined by many others, seek a protective order granting them relief from the cap on deposition time with Mr. Richards despite his ill health. They bring their respective motions under section 2025.420(a) of the Code of Civil Procedure, which provides in relevant part: "Before, during, or after a deposition, any party, any deponent, or any other affected natural person or

organization may promptly move for a protective order."

ABCO suggests that an Order providing for 35 to 41 additional hours of Mr. Richards' deposition would be appropriate based on the number of defendants remaining. (*See* ABCO Mem. at n.3.) In its Reply (at p. 2:26), Cahill asserts that each defendant would need "a minimum of 30 additional minutes" to complete their respective cross-examinations of Mr. Richards, amounting to an additional 40 to 46 hours of deposition.

The Court DENIES Moving Defendants' respective Second Motions for Protective Order re: Deposition of Plaintiff Edward Richards. As explained below, the Court finds that Section 2025.295 passes muster under the United States and California Constitutions. The Court further finds that a protective order under section 2025.420 of the Code of Civil Procedure, which would require the Court to exercise its limited discretion to exceed the time limits set by Section 2025.295, is not warranted by the facts of the case. Given lingering questions about the parameters of the Court's limited discretion, the Court will certify this order for interlocutory appeal under section 166.1 of the Code of Civil Procedure.

New Code of Civil Procedure Section 2025.295

In 2019, the California Legislature passed a law changing the rules about the duration of a deposition in civil cases involving plaintiffs with mesothelioma or silicosis. The plain language of Section 2025.295 is not ambiguous. Effective January 1, 2021, Section 2025.295 provides:

"(a) Notwithstanding Section 2025.290, in any civil action for injury or illness that results in mesothelioma or silicosis, a deposition examination of the plaintiff by all counsel, other than the plaintiffs counsel of record, shall be limited to seven hours of total testimony if a licensed physician attests in a declaration served on the parties that the deponent suffers from mesothelioma or silicosis, raising substantial medical doubt of the survival of the deponent beyond six months.

(b) Notwithstanding the presumptive time limit in subdivision (a), upon request by a defendant, a court may, in its discretion, grant one of the following up to:

(1) An additional three hours of deposition testimony for no more than 10 hours of total deposition conducted by the defendants if there are more than 10 defendants appearing at the deposition.

(2) An additional seven hours of deposition testimony for no more than 14 hours of total deposition conducted by the defendants if there are more than 20 defendants appearing at the deposition.

(c) The court may grant the additional time provided for in paragraphs (1) and (2) of subdivision (b) only if it finds that an extension, in the instant case, is 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."

(Code Civ. Proc. § 2025.295.)

Legal Standards for Analysis of Defendants' Constitutional Challenges

According to ABCO, "[t]his Motion is brought based on the unconstitutional nature of C.C.P. § 2025.295 as drafted, as well as the fact that the statute is inapplicable to Plaintiff Richard Edwards' deposition due to Plaintiffs' intention to use the deposition for trial preservation testimony." (ABCO Notice of Motion, filed 5/19/21, at 2.) Cahill references the constitution in its Notice of Motion, but couches its motion primarily in the language of section 2025.420 of the Code of Civil Procedure as seeking "orders that justice requires to protect Defendants' right to discovery, including from undue burden and irreparable harm, caused by the time-limits imposed on defendants to cross-examine plaintiff' Mr. Edwards. The source of the Court's authority are the Court's "constitutional, statutory[-] and inherent powers." (Cahill Notice of Motion, filed 5/19/21, at 2.)

Moving Defendants thus appear to blend the concepts of facial and as-applied constitutional challenges in this motion. A facial challenge "considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*People v. Super. Ct. (J.C. Penney)* (2019) 34 Cal. App. 5th 376, 387 [quoting *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084].) "In contrast, 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. [Citations].”” (*Id.*)

Of course, “A party challenging the constitutionality of a statute ordinarily must carry a heavy burden. “Facial challenges to statutes . . . are disfavored. Because they often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a bare-bones record. [Citation.] . . . Accordingly, we start from the strong presumption that the [statute] is constitutionally valid.’ [Citations.] ‘We resolve all doubts in favor of the validity of the [statute].’ [Citation.] Unless conflict with a provision of the state or federal Constitution is clear and unmistakable, we must uphold the [statute]. [Citations.]” (J.C. Penney, 34 Cal. App. 5th at 387 [quoting *Building Industry Ass’n of Bay Area v. City of San Ramon* (2016) 4 Cal. App. 5th 62, 90].) The as-applied challenge “must establish the particular application of the statute violates the [party’s] constitutional rights. [Citation].” (J.C. Penney, 34 Cal. App. 5th at 387 [quoting *Coffman Specialties, Inc. v. Department of Transp.*, (2009) 176 Cal. App. 4th 1135, 1145].)

Due Process in Civil Cases

This motion concerns alleged due process violations, which are distinct from confrontation clause violations. While the Moving Defendants occasionally reference it, the confrontation clause is really not at issue here. “In civil proceedings, . . . , the right to confront and cross-examine witnesses is found in the due process clauses of the federal and state constitutions.” (*People v. Oray* (2021) 63 Cal.App.5th 529.) In

civil actions, "[t]hat means only that the procedure adopted comport with fundamental principles of fairness and decency. The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure." (*Murillo v. Super. Ct.* (2006) 143 Cal.App.4th 730, 738; *see also Shaw v. County of Santa Cruz* (2009) 170 Cal.App.4th 229, 265 n. 44 ["The due process provisions of the California Constitution are the substantial equivalent of portions of the Fourteenth Amendment and they evoke substantially the same standards as those prescribed by the federal Constitution."].)

Analysis

Moving Defendants' Contentions

Section 2025.295 places a cap on the total number of hours a terminally ill mesothelioma patient must spend in deposition. The Moving Defendants contend that the cap is not fair because it is inflexible. While the cap increases based on the number of defendants up to the twentieth defendant, it does not expand any further after reaching twenty defendants. The fourteen-hour cap remains the cap regardless of whether there are twenty-one or a hundred and twenty-one defendants.

Section 2025.295 is thus different from some other limits placed on deposition discovery, which explicitly give the court discretion to modify the limits based on the needs of a given case. These include the seven-hour time limit in section 2025.290 for witnesses who are in imminent danger of losing their lives to mesothelioma, as well as other state and federal rules

relating to time limits and to the total number of depositions that can be taken in a civil case.

Moving Defendants argue that, because there is no dispute that there is substantial medical doubt that Mr. Richards will live more than six months, Mr. Richards' direct examination deposition testimony may constitute trial preservation testimony. If Mr. Richards is unable to testify at trial, Defendants contend that they will have been denied their due process rights to adequately cross-examine him during his deposition. Moving Defendants note that deposition discovery is particularly important in preparing a case for trial and also argue that other provisions in the California Civil Discovery Act authorize trial courts to use discretion to modify discovery based on the specific circumstances of the case before them.

The Moving Defendants focus on the relationship between the time limit and the total number of defendants in the case. By dividing the time limit by the total number of defendants, they point to a low pro rata amount of time. If 80 to 92 defendants appeared through counsel at Mr. Richards' deposition, each single defendant would have roughly nine to 10.5 minutes to ask him questions on the record.

Many of the defendants opine that, in their opinion, they were not able to fully and fairly examine Mr. Richards given the time constraints (*e.g.*, Brannon Dec. ¶ 10; Glezakos Dec. Exhs. 13-21, 27-40). They also complain that Plaintiffs' counsel had at least eight full hours to directly examine Mr. Richards at the start of the deposition (Brannon Dec. ¶ 6; Glezakos Dec. Exhs. 1-4). Cahill suggests that the Court ought to bar Plaintiffs from using Mr. Richards' deposition

at all unless Defendants are given more time to examine him.

The Moving Defendants further argue that Mr. Richards was evasive in his testimony, and that he and plaintiffs' counsel were trying to "run out the clock" on the 14 hours of cross-examination time provided to Defendants.

Construing Section 2025.295

The Court is not persuaded that constitutional requirements are impacted by Defendants' objections. In reaching this conclusion, the Court begins by construing the statute itself. Set out above, Section 2025.295 is unambiguous. It plainly sets a cap on total deposition time for cross-examination of a mesothelioma plaintiff where a licensed physician has opined that there is "substantial medical doubt of the survival of the deponent beyond six months." The new statute does not explicitly allow for the trial court to exercise discretion to lengthen the time of the deposition beyond fourteen hours.

Second, the legislative history supports the Court's conclusion that the new statute does not provide much room to exercise discretion. When they enacted Section 2025.295, the Legislature was well aware that courts had been empowered to exercise their discretion to allow more than fourteen hours of deposition time of plaintiffs with mesothelioma. We may assume that the Legislature knew that the Court of Appeal had analyzed Section 2025.290 and confirmed the trial court's generally unfettered discretion to extend deposition time of a plaintiff with mesothelioma by asbestos defendants in *CertainTeed Corp. v. Superior Court* (2014) 222 Cal.App.4th 1053. When

the Legislature enacted Section 2025.295 last year, it consciously omitted the language that the CertainTeed Court had relied on in its earlier interpretation.

The Final Senate Floor Analysis of SB645 (2019) at pp. 3-4 further supports the Court's conclusion. It states in relevant part:

> "Generally, deposition testimony is limited to seven hours per deponent, except as provided or as ordered by the court. In complex cases, however, depositions are exempt from the limit. One exception to this exemption is where a physician attests that the deponent suffers from a condition raising substantial medical doubt of survival beyond six months. In such a case, the deposition is limited to two days of no more than seven hours of total testimony each day. Despite this provision protecting dying deponents, the statute has been interpreted to allow discretion, and such deponents have been subjected to depositions much longer than the 14 hours provided for in the statute.
>
> "In response, this bill places a clear cap of seven hours on the deposition testimony of a plaintiff deponent when: (1) the plaintiff suffers from mesothelioma or silicosis; (2) the action is for injury or illness resulting in such illness; and (3) a physician attests that such illness raises doubt as to the plaintiffs survival beyond six months. Courts have the ability to extend such depositions where there are more than 10 defendants appearing at the deposition." [Note that final version of the new statute allows up to 14 hours of

deposition cross-examination.]

Given the plain language and legislative history, Section 2025.295 itself takes away much of the discretion previously held by the Court to extend deposition time under cases like CertainTeed. As explained below, however, the Court finds it does retain some limited discretion to extend the time for deposition of a witness covered under Section 2025.295. Specifically, other provisions of the Discovery Act empower the Court to prevent gamesmanship and sanctionable conduct in deposition, like bullying or improper coaching, and to provide a remedy for such gamesmanship that could include requiring additional deposition time.

Due Process

Having determined that the statute leaves little room for the trial court to exercise its discretion, the Court must next determine whether the time limits set by Section 2025.295 comport with "fundamental principles of fairness and decency." (*Murillo*, 143 Cal.App.4th at 738.) The answer is yes, whether the Moving Defendants' concerns are taken as a facial or an as-applied challenge.

Facial Challenge

As a facial challenge, Defendants fail to explain how section 2025.295 could violate the due process clause under all circumstances. They do not present a textual analysis of the statute. They also do not present any case authority to support their position concerning a facial challenge. They do not even cite to authority supporting a constitutional right to discovery in general or to deposition discovery in

particular. Indeed, at least as a purely academic matter, it is unclear whether a constitutional right to discovery exists at all in civil cases.

Defendants' argument appears to reduce to the theory that due process always requires the trial court be able to exercise its discretion to alter the procedures set out in a statute concerning a method of discovery. Such an argument has no support in any case law cited by Defendants and the Court is not aware of any. Even Defendants seem prepared to concede that setting limits on deposition time for a mesothelioma plaintiff may make sense in situations involving 20 or fewer deponents. That concession in itself would appear to doom a true facial challenge to Section 2025.295. Time limits as a concept, in and of themselves, are imposed even at trial in state and federal courts across the country (though over the years California has been more hostile to trial time limits than have other jurisdictions). Section 2025.295 easily survives a facial challenge.

As-Applied Challenge

Defendants' as-applied challenge fails to establish a departure from fairness and decency sufficient to be a due process violation. By 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 deposition. An objective layperson could easily conclude that someone in the situation of the small class of extremely ill individuals covered by Section 2025.295 ought not to have to spend more than

fourteen hours on the record being cross-examined by a large group of lawyers, no matter how friendly.

Both Mr. Richards and one of his physicians, Dr. Ajithkumar Puthillath, have submitted sworn declarations averring that there is substantial medical doubt he will live more than six months, and also that a further deposition could endanger Mr. Richards' health. Moving Defendants have not established to the Court's satisfaction that requiring Mr. Richards to sit for roughly 35 more hours (five full days) of continued deposition would comport with fundamental principles of fairness and decency.

The cases relied upon by the Moving Defendants are not particularly helpful in an analysis of Section 2025.295. For example, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (cited in *Abco Mem.*, filed 5/19/21, at 5], concerned a district court's decision to permit the immediate entry of an amended judgment against the plaintiff in a patent infringement lawsuit. The plaintiff was a corporation, which was controlled by the inventor of the patent-in-suit. The defendant prevailed in the case due to the inventor's inequitable conduct before the U.S. Patent and Trademark Office. The district court awarded fees and costs to the defendant. The defendant convinced the district court to allow amendment of the pleadings to name the inventor as an individual, in addition to the corporation. Simultaneously, the district court permitted entry of an amended judgment against the inventor, which meant that he (not just the corporation) would be hit with a judgment for fees and costs.

The individual inventor was not given an opportunity to address the amendment of the judgment. The U.S. Supreme Court explained that the individual

inventor "was never afforded a proper opportunity to respond to the claim against him. Instead, he was adjudged liable the very first moment his personal liability was legally at issue. Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process." (Nelson, 529 U.S. at 468 [in a footnote following this passage, Justice Ginsberg, writing for the unanimous Court, quoted extensively from Alice in Wonderland].)

The California Supreme Court's decision in Marriage of Flaherty (1982) 31 Cal. 3d 637, 654, is similarly unhelpful. There, the Court of Appeal had imposed a $500 sanction against counsel for filing a frivolous appeal in a family law matter. The sanction came completely out of the blue, without an order to show cause, or any other notice, first being issued by the Court of Appeal. (*Id*. at 652.) The California Supreme Court explained that without "fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing," sanctions against counsel violated due process (it probably helped that the Supreme Court also found elsewhere in the opinion that the appeal was not frivolous). (*Id.* at 654.)

Here, we are not faced with anything approaching what happened in Nelson or in Marriage of Flaherty. The parties are a long way from the Court entering a judgment. Defendants have been, and will continue to be, heard on any substantive or procedural motion before the Court, and those left at trial will have an opportunity to present evidence and to argue. All parties received notice of Plaintiff s deposition and were able to observe and, within the guidelines nego-

tiated by counsel given the mandate of Section 2025.295, to participate.

Section 2025.295 has eliminated the sort of sliding-scale approach that some trial courts may have used in the past to permit additional deposition time under CertainTeed, with time going up as the total number of defendants in the case went up. The presence of more than twenty (or ninety or even 190) defendants, however, does not render Section 2025.295 unconstitutional as applied. Again, there is no authority from which the Court can infer a constitutional right to a minimum per-party amount of deposition time. Again, the Legislature has determined that a terminally ill mesothelioma patient should not be subjected to more than fourteen hours of deposition regardless of the number of defendants who wish to take his or her testimony.

The Court is not prepared to hold that Section 2025.295 bars any and all exercise of discretion in providing a defendant a bit more time to take a mesothelioma patient's deposition. For example, the Court has the power to address gamesmanship and questionable conduct in court proceedings, including in deposition. Just as the Court can be asked to enter a protective order to prevent bullying a witness, so too can the Court enter a protective order to stop frivolous speaking objections or delay tactics improperly and willfully used by an attorney or to extend deposition time to provide a remedy for such discovery abuse-even if the attorney's client falls in the category covered by Section 2025.295.

The Court has examined the Richards deposition transcript and has not found discovery abuse by Mr. Richards or his counsel sufficient to make it necessary

to exceed the limits set out in Section 2025.295 in order to comport with fundamental fairness. At most, counsel made a series of inappropriate speaking objections and unnecessarily wasted a small amount of time warning defense counsel that the proverbial clock was ticking down. In the aggregate, however, it does not appear those speaking objections were consciously used as a delay tactic. The testimony from Mr. Richards himself, cited by the Moving Defendants as showing him refusing to answer questions, generally appears to be the sort of testimony one would expect from someone who is not a professional witness. Frequently, it seems the responses a defendant did not like were due to the way the question was asked.

Protective Order Analysis

Separate and apart from the constitutional analysis, the Court is not persuaded that it should exercise its discretion under section 2025.240 to increase the deposition time limits for Mr. Richards set by Section 2025.295. In reaching this conclusion, the Court reviewed the transcript of Mr. Richards' deposition by Defendants, as well as the declarations submitted by counsel for the Moving Defendants and various joining defendants.

Massively multi-defendant civil cases appear in many corners of our justice system. Our system has developed many ways to preserve the procedural integrity of such cases. In the context of depositions, those ways have included imposing time limits on depositions. Joint defense arrangements, or common interest groups, are permissible (and encouraged), and parties may pool resources.

Here, as is expected in asbestos cases (not to mention other mass torts, patent cases, antitrust cases, and many types of class action), the defendants agreed among themselves to conduct a joint cross-examination of the witness regarding issues relevant to all of them. (*See* Moving Brannon Dec. ¶¶ 4-5; Moving Glezakos Dec. Exhs. 1-12 and Exhs. 13, 14, 17 and 18 at ¶ 4.). The Court has reviewed the transcript of Mr. Richards' deposition and finds that counsel for defendants did an admirable job covering a substantial amount of ground. If anything, it would perhaps have been appropriate for each defendant to cede a bit more time to the common defense.

The declarations by counsel for defendants do not provide the sort of facts that the Court would find compelling for purposes of exercising what limited discretion it has under section 2025.240. By way of example, pages 3-4 of the Glezakos declaration underscores the fact that counsel spent time trying to get Mr. Richards to admit that a company "manufactured many different types of floor tiles," where Mr. Richards testified that the only thing he specifically recalled was that the box of tiles he worked with had "Flintkote Asbestos Tiles" written on them.

Counsel also points to answers as evasive where they spent time attempting to establish that Mr. Richards lacked personal knowledge about what another defendant knew about the hazards of asbestos. Of course, it would be rather surprising for someone like Mr. Richards to know what an executive at a company where he never worked (but whose products he worked with) might have known about asbestos hazards thirty years ago.

The Moving Defendants do not make a showing that other avenues for discovery are inadequate (though it is unclear that a further showing in this regard would permit the Court to depart from the clear cap set in Section 2025.295). For example, no one has yet deposed Mr. Richards' co-plaintiff. Depositions of other witnesses have been scheduled but few (if any) have been taken. Further, with respect to questions concerning Mr. Richards' lack of knowledge of what a defendant might have known concerning the hazards of asbestos thirty years ago, a contention interrogatory to Plaintiffs asking for all facts supporting their contention that the particular defendant should be liable for punitive damages ought to get the defendant the information to which they are entitled. It is unclear whether any such contention interrogatories have yet been served.

To the extent that Defendants contend that Plaintiffs' interrogatory responses are still deficient (*see Brannon* Dec. ¶ 3; Glezakos Dec. ¶ 5 and Exh. 26), it is unclear what responses had been received as of the 5/19/2021 date of filing of their Moving papers or as of their 6/4/2021 Reply. (Glezakos Dec. ¶ 4.) Additionally, in connection with a different motion set for hearing at the same time as this one, the Court is denying a motion for protective order and requiring that Mr. Richards serve further responses to an unusually large number of interrogatories.

Finally, the Court OVERRULES Plaintiffs' Objections to the Moving Defendants' Second Motions for Protective Order re: Mr. Richards' Deposition. Notice and an opportunity to be heard are the touchstones of due process. The Moving Defendants' motion is ripe, and resolution of the issue of the length of

Mr. Richards' deposition is important for the parties as they prepare for dispositive motion practice and for trial. The Court of Appeal appears to have contemplated that Defendants could renew their motion once the deposition of Mr. Richards was complete.

Certification for Appeal

Defendant Cahill asks the Court to certify this order for an interlocutory appeal under section 166.1 of the Code of Civil Procedure. Section 166.1 provides:

> "Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation.? Neither the denial of a request for, nor the objection of another party or counsel to, such a commentary in the interlocutory order, may be grounds for a writ or appeal."

(Code Civ. Proc. § 166.1.)

Here, the question of the existence and extent of the 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." Some many credibly argue that Section 2025.295 takes away any and all discretion. The undersigned finds very limited discretion based on section 2025.240, 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.

/s/ Michael M. Markman
Judge

Dated: 06/15/2021

STATUTORY PROVISIONS INVOLVED

Cal. C.C.P. § 2025.290 (West's Ann.)
§ 2025.290. Time limits of depositions

(a) Except as provided in subdivision (b), or by any court order, including a case management order, a deposition examination of the witness by all counsel, other than the witness' counsel of record, shall be limited to seven hours of total testimony. The court shall allow additional time, beyond any limits imposed by this section, if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(b) This section shall not apply under any of the following circumstances:

(1) If the parties have stipulated that this section will not apply to a specific deposition or to the entire proceeding.

(2) To any deposition of a witness designated as an expert pursuant to Sections 2034.210 to 2034.310, inclusive.

(3) To any case designated as complex by the court pursuant to Rule 3.400 of the California Rules of Court, unless a licensed physician attests in a declaration served on the parties that the deponent suffers from an illness or condition that raises substantial medical doubt of survival of the deponent beyond six months, in which case the deposition examination of the witness by all counsel, other than the witness' counsel of record, shall be

limited to two days of no more than seven hours of total testimony each day, or 14 hours of total testimony.

(4) To any case brought by an employee or applicant for employment against an employer for acts or omissions arising out of or relating to the employment relationship.

(5) To any deposition of a person who is designated as the most qualified person to be deposed under Section 2025.230.

(6) To any party who appeared in the action after the deposition has concluded, in which case the new party may notice another deposition subject to the requirements of this section.

(c) It is the intent of the Legislature that any exclusions made by this section shall not be construed to create any presumption or any substantive change to existing law relating to the appropriate time limit for depositions falling within the exclusion. Nothing in this section shall be construed to affect the existing right of any party to move for a protective order or the court's discretion to make any order that justice requires to limit a deposition in order to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, undue burden, or expense.

Cal. C.C.P. § 2025.295 (West's Ann.)
§ 2025.295. Health of deponent; additional time allowed

(a) Notwithstanding Section 2025.290, in any civil action for injury or illness that results in mesothelioma or silicosis, a deposition examination of the plaintiff by all counsel, other than the plaintiff's counsel of record, shall be limited to seven hours of total testimony if a licensed physician attests in a declaration served on the parties that the deponent suffers from mesothelioma or silicosis, raising substantial medical doubt of the survival of the deponent beyond six months.

(b) Notwithstanding the presumptive time limit in subdivision (a), upon request by a defendant, a court may, in its discretion, grant one of the following up to:

(1) An additional three hours of deposition testimony for no more than 10 hours of total deposition conducted by the defendants if there are more than 10 defendants appearing at the deposition.

(2) An additional seven hours of deposition testimony for no more than 14 hours of total deposition conducted by the defendants if there are more than 20 defendants appearing at the deposition.

(c) The court may grant the additional time provided for in paragraphs (1) and (2) of subdivision (b) only if it finds that an extension, in the instant case, is 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.

Cal. C.C.P. § 2025.420 (West's Ann.)
§ 2025.420. Protective orders; authority and action by court; burden of demonstrating inaccessibility of information; court order and conditions for discovery; monetary sanctions; electronically stored information sanctions

(a) Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order. The motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, 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. This protective order may include, but is not limited to, one or more of the following directions:

(1) That the deposition not be taken at all.

(2) That the deposition be taken at a different time.

(3) That a video recording of the deposition testimony of a treating or consulting physician or of any expert witness, intended for possible use at trial under subdivision (d) of Section 2025.620, be postponed until the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent, or other means, for cross-examination.

(4) That the deposition be taken at a place other than that specified in the deposition notice, if it is within a distance permitted by Sections 2025.250 and 2025.260.

(5) That the deposition be taken only on certain specified terms and conditions.

(6) That the deponent's testimony be taken by written, instead of oral, examination.

(7) That the method of discovery be interrogatories to a party instead of an oral deposition.

(8) That the testimony be recorded in a manner different from that specified in the deposition notice.

(9) That certain matters not be inquired into.

(10) That the scope of the examination be limited to certain matters.

(11) That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, copied, tested, or sampled, or that conditions be set for the production of electronically stored information designated in the deposition notice.

(12) That designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition.

(13) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specified persons or only in a specified way.

(14) That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court.

(15) That the deposition be sealed and thereafter opened only on order of the court.

(16) That examination of the deponent be terminated. If an order terminates the examination, the deposition shall not thereafter be resumed, except on order of the court.

(c) The party, deponent, or any other affected natural person or organization that seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(d) If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(g) If the motion for a protective order is denied in whole or in part, the court may order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just.

(h) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that

other circumstances make the imposition of the sanction unjust.

(i)

(1) Notwithstanding subdivision (h), absent exceptional circumstances, the court shall not impose sanctions on any party, deponent, or other affected natural person or organization or any of their attorneys for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Cal. C.C.P. § 2025.620 (West's Ann.)
§ 2025.620. Use of deposition at trial or other hearings; procedural requirements; permitted uses; submission of total or partial testimony

At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:

(a) Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for

any other purpose permitted by the Evidence Code.

(b) An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

(c) Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following:

(1) The deponent resides more than 150 miles from the place of the trial or other hearing.

(2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:

(A) Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.

(B) Disqualified from testifying.

(C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.

(D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.

(E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

(3) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

(d) Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.

(e) Subject to the requirements of this chapter, a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced.

(f) Substitution of parties does not affect the right to use depositions previously taken.

(g) When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code.