NO. 21-_____

In the Supreme Court of the United States

FOSTER WHEELER, LLC (f/k/a FOSTER WHEELER CORPORATION) AND NIBCO, INC.,

Petitioners,

v.

SUPREME COURT OF CALIFORNIA,

Respondent,

EDWARD RICHARDS ET AL.

Real Parties in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

EDWARD R. HUGO
COUNSEL OF RECORD
HUGO PARKER, LLP
240 STOCKTON STREET, 8TH FLOOR
SAN FRANCISCO, CA 94108
(415) 808-0300
SERVICE@HUGOPARKER.COM

OCTOBER 4, 2021 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Where a mesothelioma plaintiff sues more than 100 defendants, and the plaintiff's health would not be endangered by the deposition process, does newly enacted California Code of Civil Procedure section 2025.295 violate fundamental principles of fairness and decency when it imposes an inviolable time limit on the defendants' examination, but imposes no time limit, at all, on the plaintiff's examination, with no recourse to any judicial remedies under any circumstances?

PARTIES TO THE PROCEEDINGS

Petitioners and Defendants-Petitioners Below

- Foster Wheeler, LLC
- Nibco, Inc.

Respondent

- Supreme Court of California

Real Parties in Interest and Plaintiffs Below

- Edward Richards and Linda Richards

Respondents and Defendants Below

- Columbia Mechanical Contractors
- Crosby Valve
- Golden Gate Drywall
- John Crane, Inc.
- Mueller Co., LLC
- P.E. O'Hair & Co.
- Parker Hannifin Corp.
- Service Engineering Co.

Note: These parties are defendants below in the Superior Court of California, Alameda County. They did not join Petitioners in the interlocutory appeal to the California Court of Appeal, First Appellate District, Divison Five.

CORPORATE DISCLOSURE STATEMENT

FOSTER WHEELER LLC is a wholly owned, indirect subsidiary of Amec Wheeler PLC, a publicly traded company on the London Stock Exchange. (LSE: AMEC)

NIBCO INC., a private, non-governmental party, has no parent corporation and no publicly held corporation that holds more than 10% of its stock.

LIST OF PROCEEDINGS

Supreme Court of California

No. S270137

Cahill Construction Company, v. S.C. (Richards) Division SF

Date of Order: September 15, 2021

Court of Appeals for the State of California First Appellate District, Division Five

No. A162885

Cahill Construction Company, Inc., et al., *Petitioners, v.* The Superior Court of Alameda County, *Respondent.* Edward Richards et al., *Real Parties in Interest*

Date of Opinion: July 19, 2021

Superior Court of California, County of Alameda

No. RG21088294

Richards, *Plaintiff/Petitioners, v.* 3M Company, *Defendant/Respondent*

Date of Order: June 15, 2021
(Certified for Interlocutory Appeal)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Foster Wheeler LLC (f/k/a Foster Wheeler Corporation) and Nibco, Inc. ("Petitioners"), respectfully request that this Court issue a writ of certiorari to review the denial of Petitioners' Writ of Mandate in the Court of Appeal of the State of California, First Appellate District, issued July 19, 2021, and subsequent denial of Petitioner's Petition to the California Supreme Court, issued on September 15, 2021.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, which was certified for publication, was issued on July 19, 2021, and is attached at App.2a. The California Supreme Court's one-page order denying review is attached at App.1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which Petitioners seek review was issued on July 19, 2021. (App.2a) The California Supreme Court order denying Petitioners' timely petition for discretionary review was filed on September

15, 2021. (App.1a) This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Civ. Proc. Code 2025, Relevant Sections

The following California statutory provisions and judicial rules relevant to this petition are reproduced at App.40a.

Cal. Civ. Proc. Code 2025.290

Cal. Civ. Proc. Code 2025.295

Cal. Civ. Proc. Code 2025.420

Cal. Civ. Proc. Code 2025.620

STATEMENT OF THE CASE

A. The Pleadings and the Direct Deposition Examination

On January 29, 2021, plaintiffs filed an asbestos personal injury complaint alleging that Edward Richards had contracted pleural mesothelioma, a fatal cancer of the lining of the lungs, from occupational and non-occupational exposure to asbestos. The 69-page Complaint names 105 defendants, sets forth 11 causes of action, and seeks monetary and punitive damages.

Before Petitioners and many of the 105 named defendants had even appeared in the action, Plaintiffs filed a motion seeking a preferential trial date based on Mr. Richards's health. (Code of Civil Procedure section 36.) The motion was granted, and a preferential trial date was set for August 9, 2021.

Plaintiffs noticed the deposition of Mr. Richards "to preserve [his] testimony for purposes of trial." Mr. Richards's videotaped trial preservation deposition proceeded over several days in April, lasting between eight and nine hours on the record (the "April Order.") Between 80 and 90 defendants attended the deposition.

B. First Trial Court Proceedings

After Mr. Richards had been examined for approximately eight to nine hours by his counsel, but before cross-examination of Mr. Richards was scheduled to begin, Petitioners and other defendants filed motions for a protective order asking the trial court to increase the time limit for their examination above the 14 hours set forth in Section 2025.295(b)(2).

At the hearing on the motions, the trial court was advised that in their written discovery responses and the eight to nine hours of direct deposition examination, Plaintiffs claimed that Mr. Richards had been exposed to asbestos-containing products for a 33-year period, from 1965 until 1998; that he had worked on numerous types of asbestos-containing equipment, including pumps, valves, steam traps, strainers, condensers, evaporators, boilers, turbines, generators, cooling towers, coolers, chillers, furnaces, water heaters, air heaters, climate control equipment, and piping; that he had been exposed to multiple types of asbestos-containing products, including insulation, insulating materials, asbestos-cement, asbestos-piping, asbestos-louvers, flooring tile, magnesite flooring, terrazzo flooring, mastics, gaskets, tape, sealants, packing, drywall, texture, joint compound, ceiling tile, fireproofing, asbestos cloth, asbestos rope, asbestos paper, adhesives, wires, cabling, and other unidentified materials; that he had worked for multiple employers for various periods of time including weeks, months or years at dozens of locations, including ships, shipyards, refineries, power plants, steel plants, generating stations, chemical facilities, hospitals, apartment buildings, schools, commercial buildings, industrial buildings and PG&E pipelines; and that he had worked alongside multiple different trades who themselves worked with asbestos-containing products. Mr. Richards also claimed non-occupational exposures to automotive brake, clutch and gasket replacements on multiple identified and unidentified vehicles.

Plaintiffs argued that Petitioners should not be allowed any time above the seven-hour presumptive limit set forth in Section 2025.295(a). The trial court

denied Plaintiffs' request finding that they offered no evidence that "granting defendants 14 hours of total deposition cross-examination would endanger Mr. Richards's health." The trial court added: "Needless to say, where there are more than 100 named defendants, it is in the interest of fairness to allow defendants the maximum permissible period in which to cross-examine Mr. Richards."

The trial court also rejected Petitioners' arguments that it should grant more time above the 14-hour maximum permitted by Section 2025.295(b)(2). "Defendants' due process/basic fairness argument may be more compelling but the parties cite no authority that would allow [Respondent Court] to extend the 'clear cap' specified in Section 2025.295(b)."[1] The trial court pointed out that unlike Section 2025.290 and the holding of *CertainTeed Corp. v. Sup. Ct.* (2014) 222 Cal.App.4th 1053, Section 2025.295 "has eliminated any discretion when the witness has either mesothelioma or silicosis and a licensed physician has submitted a competent declaration declaring that there is substantial medical doubt of the survival of the deponent beyond six months."

C. First Petition for Writ Relief

Petitioners promptly filed a Petition for Writ with the First District Court of Appeal. Division Five denied the petition because Mr. Richards's deposition had not yet been completed and therefore Petitioners had not demonstrated either irreparable harm or an exhaustion of possible remedies through the trial court.

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[1] The point of this Petition for Review is to obtain the very authority the California trial courts need.

D. Cross-Examination and Second Trial Court Proceedings

Thereafter, 80-90 defendants participated in the defense portion of the deposition of Mr. Richards, collectively consuming all 14 hours allotted, with each defense counsel averaging less than eight minutes each for cross-examination.

Petitioners thereafter immediately filed a second motion for protective order with the trial court. In support, Petitioners submitted substantial evidence establishing the irreparable harm caused by the 14-hour time limit. Because Judge Lee was on leave, the matter was assigned to the Hon. Michael Markman.

Unlike Judge Lee, Judge Markman found that the trial court had "limited discretion" to order more time, though he declined to exercise any. Specifically, Judge Markman's order acknowledged that some may "credibly argue that Section 2025.295 takes away any and all discretion. The undersigned finds very limited discretion based on [S]ection 2025.240 [sic], but finds that the presence of a large number of defendants alone is insufficient to satisfy the requirements for exceeding the clear cap set by Section 2025.295. These questions are likely to recur in many future cases until the Court of Appeal can either (a) confirm that this Court's approach is the right one, (b) determine that Section 2025.295 eliminates all discretion, or else (c) set out guidelines concerning when (if ever) the simple aggregate number of defendants alone might permit a departure from the clear cap in Section 2025.295."

E. Second Petition for Writ and Opinion

Petitioners filed a second petition for writ relief. The matter was again assigned to Division Five, which issued an Order to Show Cause, finding that the petition presented questions of first impression of general importance; that two judges of the same superior court had reached conflicting interpretations of Section 2025.295; and that Petitioners had demonstrated inadequate remedies and irreparable harm if writ review were not granted. (Opinion, p. 6.) Following accelerated briefing and oral argument, Division Five ruled that Section 2025.295, read literally and in light of its legislative history, meant to and did place a "hard cap" on the time defendants have to depose a mesothelioma plaintiff; that trial courts have no discretion to increase the time regardless of any circumstances that may arise before or during the deposition; and that fundamental fairness and due process were not offended, even though one side in this case had a total of nine hours to elicit testimony from Mr. Richards whereas the defendants had on average just seven or eight minutes. (Opinion, p. 2.)

REASONS FOR GRANTING THE PETITION

I. SECTION 2025.295 CANNOT PASS CONSTITUTIONAL MUSTER IF IT ELIMINATES FROM THE TRIAL COURTS ALL DISCRETION TO FASHION ANY RELIEF AS JUSTICE MAY REQUIRE.

Pursuant to the California Civil Discovery Act, all parties to a civil action are entitled to obtain discovery, including taking the oral deposition of any person with knowledge "relevant to the subject matter involved in the pending action." (Cal. Civ. Proc. Code § 2017.010. *See also* Cal Civ. Proc. Code § 2019.010 [methods of discovery].) This broad right to discovery is consistent not only with the legislative intent to "take the gamesmanship out of litigation" (*Greyhound, supra*, 56 Cal.2d at p. 376), but also with the constitutional right to due process which allows a defendant to conduct discovery so that it might fully prepare its defense to the claims asserted against it in advance of trial. (*Tokio Marine & First Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 123.)

The grant of unlimited time to one side (plaintiff) and the imposition of a hard cap of time to the other side (defense) to depose the plaintiff clearly invokes due process considerations. While "'[t]here is no right to confrontation under the state and federal confrontation clause in civil proceedings . . . such a right does exist under the due process clause.'" (*People v. Nelson* (2012) 209 Cal.App.4th 698, 712, quoting *People v. Otto* (2001) 26 Cal. 200, 214; same: *People ex rel Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1568.) "Due process is a flexible concept, and

must be tailored to the requirements of each particular situation. 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" [cit.om.] (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 654; *see Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895.) "[D]ue process of law has never been a term of fixed and invariable content." (*Federal Communications Commission v. WJR, The Goodwill Station* (1949) 337 U.S. 265, 275.)

"In determining applicable due process safeguards, it must be remembered that 'due process is flexible and calls for such procedural protections as the particular situation demands.'" (*People v. Ramirez* (1979) 25 Cal. 260, 268 [citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.)

In civil cases, "'[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.'" [Citation.]" (*People v. Bona* (2017) 15 Cal.App.5th 511, 520 [emphasis added].)

Until the adoption of Section 2025.295, the Discovery Act created balanced and flexible procedures which favored neither side in litigation and left the trial courts with discretion to issue appropriate protective orders as circumstances warranted. Even when time limits on depositions were first imposed in 2012 through the addition of Section 2025.290, the Legislature expressly permitted the trial courts to adjust the time limit as circumstances may warrant: "The statute gives no guidance as to how a court should exercise its discretion when considering a request to

lengthen a deposition time. . . . It does, however, identify two circumstances under which the court must extend the deposition's length: 'if needed to fairly examine the deponent" or if anyone or anything "impedes or delays the examination.'" (Hogan and Weber, CALIFORNIA CIVIL DISCOVERY, Second Ed. (LexisNexis 2020) § 2.7 [emphasis added].)

Effective January 1, 2020, Section 2025.295 broke from this tradition by imposing one-sided time limits and removing all discretion from the trial courts. Under Section 2025.295, if a physician attests in a declaration that a plaintiff has been diagnosed with mesothelioma or silicosis and there is substantial medical doubt of his survival beyond six months, a presumptive seven-hour time limit is imposed on the defendants' cumulative time to examine the plaintiff, which may be increased if the Court finds that plaintiff's health would not be endangered, but only by three hours if 10 or more defendants appear for the deposition, and up to a maximum of 14 hours if more than 20 defendants appear. No matter how many defendants have been named above 20, whether it be 21 or over 100 as here, and no matter what the circumstances of the case or the deposition itself might be, Section 2025.295 removes from the trial courts any discretion to increase defendants' cumulative deposition time beyond 14 hours. No time limit, whatsoever, is similarly imposed on a plaintiff's attorney's direct or re-direct examination of the plaintiff, regardless of the asserted medical impact on a plaintiff's health. In other words, even where a trial court has found that a plaintiff's health will not be endangered by additional deposition time and the plaintiff has in fact withstood hours of direct examination, such as

was the case here, Section 2025.295 as interpreted eliminates all discretion from trial courts to fashion equitable remedies as the circumstances may require.

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

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

In *CertainTeed, supra*, 222 Cal.App.4th at p. 1056, the discretion of the trial courts to authorize more time for depositions in asbestos cases was upheld.

In reaction to *CertainTeed*, the Legislature added Section 2025.295 to carve out a unique, unprecedented exception to the trial courts' historic discretion for one class of plaintiffs. Unlike the unfettered discretion allowed by Section 2025.290, under Section 2025.295

the trial court's discretion is confined to granting up to three additional hours "if there are more than 10 defendants appearing at the deposition" and up to seven additional hours if there are more than 20 appearing defendants. Before granting the additional three to seven hours, the trial court must find that an extension of time would be "in the interest of fairness, which includes consideration of the number of defendants appearing at the deposition and [a determination] that the health of the deponent does not appear to be endangered by the grant of additional time." (*Id.*) No additional time beyond 14 hours may be granted notwithstanding any other consideration.

No similar surgical removal of a trial court's discretionary authority over civil discovery exists anywhere. Since January 2020, Section 2025.295 has stood in drastic contrast to every other provision of the Civil Discovery Act. It also stands in stark contrast to the time limit rules for depositions of other jurisdictions and of the federal courts. For example, effective 2000, Congress amended Rule 30 of the Federal Rules of Civil Procedure to impose a presumptive seven-hour time limit on depositions. The time limit can be altered by agreement of the parties or by court order upon a showing good cause. The Committee Notes for Rule 30 point out that in considering whether to allow more time above the presumptive seven-hour limit, the parties and courts "might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time . . . . In multi-party cases, the need for each party to examine the witness may

warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest." Similarly, should the lawyer for the witness want to examine the witness, "that may require additional time." (Fed. R. Civ. Proc., Rule 30, Committee Notes on Rules, 2000 Amendment; emphasis added.)

Committee Notes also suggest that factors could come into play that would make more time mandatory. "In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by "other circumstances," which might include a "power outage, a health emergency, or other event." (Fed. R. Civ. Proc., Rule 30, Committee Notes on Rules, 2000 Amendment; emphasis added.)

In considering whether to enact Section 2025.295, the Senate Judiciary Committee pointed to the time limit rules found in Arizona and Texas but failed to adopt the judicial discretion embedded in those states' statutes. Arizona Rules of Civil Procedure, Rule 30(d)(1) sets a four-hour time limit on depositions, "[u]nless the parties agree or the court orders otherwise." Likewise, Texas Rules of Civil Procedure, Rule 190.2 (b)(2) sets a 20-hour time limit for all depositions but "the court may modify the deposition hours so that no party is given an unfair advantage."

It is the flexibility for altering time limitations afforded through the discretion of the trial courts that avoids offending due process. When that discretion is removed, especially when coupled with the one-sided application of the time limit, fundamental fairness

and decency are offended because the plaintiff may strategically develop testimonial evidence with no time constraints, whereas the defendants cannot. While other discovery tools may be available to both sides equally, constraining just one side in our adversarial system with inflexible time limits in the context of depositions, only, is fundamentally unjust. In this sense, depositions are uniquely valuable, which we discuss next.

II. OTHER DISCOVERY TOOLS CANNOT REPLACE PLAINTIFF'S DEPOSITIONS IN ASBESTOS CASES, ESPECIALLY IN THE COMPRESSED TIME AVAILABLE TO COMPLETE DISCOVERY WHEN TRIAL PREFERENCE IS GRANTED.

The First District's Opinion suggests that the curtailment of Petitioners' cross-examination rights is acceptable because other discovery tools remain available. This ignores the unique value of depositions of plaintiffs in asbestos cases, especially in the compressed time available to complete pre-trial discovery in preference cases. It also ignores the fact that plaintiff's counsel may freely use as much time as they see fit in a deposition of their own client knowing full well that defense counsel will not be afforded the same opportunity to develop testimony in the exact same deposition.

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

While written discovery may prove helpful, it is no replacement for real time deposition cross-examination which allows for immediate follow-up to evasive or overbroad answers from a deponent. "The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross examination." (*Target Nat'l Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1, 7, citing *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585.)

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

Asbestos cases turn on proof that a plaintiff was exposed to asbestos from a product or at a worksite, often decades in the past. The plaintiff himself is often in the best position to know where he was and what he was doing; rarely are there co-workers available or documentation in sufficient detail to assist either side. The deposition of the plaintiff is therefore almost always the most important tool for discovering the factual foundation for the claims made against a particular defendant. The outcome of the plaintiff's deposition can prove dispositive. (*See*, *e.g.*,

McGonnell v. Kaiser Gypsum Co. (2002) 98 Cal.App.4th 1098.) By the time of the deposition, the plaintiff's own counsel knows the facts concerning plaintiff's claims as counsel typically obtained them before drafting the complaint. In a living mesothelioma case, plaintiff and his counsel determine not only when to file the complaint and which defendants to name, but when to move for trial preference under section 36 of the Code of Civil Procedure. If granted, the trial must be held within 120 days. In this case, the complaint was filed in January; defendants were served but did not all appear in the action until March; a preferential trial date was set for August. That means the defendants have on average less than six months to respond to and conduct discovery, locate evidence, determine the possible fault of others, including non-parties, prepare dispositive motions, retain experts, and otherwise prepare for a jury trial in which a plaintiff will be seeking millions of dollars in compensatory and often punitive damages.

The deposition transcript is often admissible in evidence at trial. A party's deposition is admissible against it under the exception to the hearsay rule for admissions of a party opponent. (Evid. Code § 1220.) "Should a witness's trial testimony vary from the deposition testimony, the earlier answers are admissible as prior inconsistent statements. As such, they are usable not only to impeach the trial version, but, in California, also substantively (that is, for the truth of the matter asserted) under a hearsay rule exception." (Hogan, *supra*, § 1.4.) Deposition testimony is generally admissible at trial if the deponent is not available at trial. His testimony may be read to the jury and used against a party provided that the party was either

present at the deposition or had notice of the deposition and did not serve a valid objection. (Code Civ. Proc. § 2025.620.)

Deposition testimony can be used for impeachment. Nothing prevents a witness from contradicting or outright denying statements or testimony he or she has given in the past. However, that witness can be confronted by the prior statements which are an exception to the hearsay rule. "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ." Section 2025.620 incorporates this exception when it allows use of a deposition not only to impeach or contradict a witness, but also 'for any other purpose permitted by the Evidence Code.' Thus, whenever a portion of a deposition is received in evidence to impeach the deponent's credibility, the trier of fact may also use that deposition testimony substantively, that is, as the correct account of the facts involved." (Hogan, *supra*, § 2.37.)

Defendants bear the burden of proving the potential liability of parties not named by Mr. Richards as defendants, such as his employers, branches of the U.S. military, entities that have become defunct or have no insurance or assets, and entities now protected by the bankruptcy laws. (Cal. Civ. Proc. Code § 1431.2 [Proposition 51]; *Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319, 699-700 [burden of proof for allocation of fault rests on defendants at trial]. *See also Pfeifer v. John Crane* (2013) 220 Cal.App.4th 1270, 1285.) The plaintiff is often the most important witness as to the exposure to asbestos he experienced from products and conduct not related to the defendants he has sued. His deposition is, therefore,

valuable for the fair implementation of California's Proposition 51 rules and another reason for permitting fair examination at the deposition.

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

The arbitrary and immovable time limits imposed on defendants in just one category of personal injury cases by Section 2025.295 creates a setting in which the value of a plaintiff's deposition is no better than a self-serving statement or written declaration. As such, Section 2025.295 cannot survive an as-applied due process challenge. (*See Tobe v. City of Santa Ana* (1995) Cal.4th 1069, 1084 ["an as-applied challenge 'contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right.'"].)

The indecency of Section 2025.295 is demonstrated by the facts of this case. The trial court agreed that Mr. Richards's health would not be harmed by having to sit for extended hours of deposition by defendants. Indeed, Mr. Richards's own counsel deposed him for nine hours. Over 80 defendants appeared at a deposition involving over 30 years of detailed work history. By the account given on direct examination, Mr. Richards's exposures to asbestos began over 55 years ago and encompassed more than three decades. During that time, he believes he encountered hundreds of asbestos-containing products and equipment in hundreds of settings. At his deposition, Mr. Richards's attorney chose to examine him about those aspects of

his work history that would selectively highlight and implicate Petitioners and the other named defendants. Counsel consumed at least eight hours on the record developing that testimony. Defendants agreed among themselves to have two attorneys ask questions common to all, such as family history, medical background and the like, a process that consumed some of the 14 hours. The remaining hours were divided among the 80-90 appearing defendants which meant that each had seven to eight minutes to ask about their products or worksite, no matter how many were at issue. Many defense counsel agreed that that amount of time was inadequate and many protested.

While the trial court found that Petitioners were able to "participate" in the deposition of Mr. Richards under the mandate of Section 2025.295, mere participation alone is not, and should not be, the standard. The participation must be meaningful. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. . . . [T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*People v. Brown* (2003) 31 Cal.4th 58, 538.) Even in non-criminal cases, a person's right to cross-examination is a part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment of the federal Constitution . . . " (*August v. Dept. of Motor Vehicles* (1968) 264 Cal.App.2d 52, 60.) Cross-examination is an absolute right, the denial of which violates a party's due process rights. (*Long v. Long* (1967) 251 Cal.App.2d 732, 736.) The right to cross-examine a

witness is fundamental in our judicial system. (*Harries v. United States* (9th Cir. 1965) 350 F.2d 231, 236.)

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

III. THIS PETITION RAISES ISSUES OF WIDESPREAD IMPORTANCE, CERTAIN TO RECUR IN FUTURE CASES.

The First District has now endorsed a rule that permits one side unlimited time to depose a plaintiff on both direct and re-direct and places an immovable cap on the other side's time for cross-examination. The First District finds no due process concerns and is likely to refuse to entertain any future cases challenging Section 2025.295 no matter how egregious the circumstances.

Section 2025.295 restores gamesmanship to depositions and invites unfair tactics. Without the ability to resort to judicial intervention, mesothelioma plaintiffs may simply run out the clock in depositions with lengthy, nonresponsive answers, a concern Petitioners raised with the trial court. Their counsel may resort to coaching, bullying and other unfair tactics — and will face no consequences. Defendants will find themselves unable to effectively cross-examine the key witness in the case. Some may not be able to cross-examine the plaintiff at all if other defendants consume the few hours permitted, or if they are brought into the

case as Doe amendments after the plaintiff has been deposed. Without effective cross-examination, plaintiffs may elect to appear at trial, knowing that that they are free to testify with little fear of impeachment. The defendants will be far more vulnerable to future wrongful death actions based on the preserved testimony of a plaintiff they could not effectively cross-examine.

Petitioners urge this Court to grant review and intercept these issues before they grow out of control and harm Petitioners and other defendants in asbestos and silicosis litigation. Given the issues of first impression tendered in this petition are of widespread interest, their prompt resolution is of general importance to the bench and the bar in California. (*See Corbett v. Sup.Ct. (Bank of America, N.A.)* (2002) 101 Cal.4th 649, 657.)

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the California Supreme Court's denial of Petitioner's petition.

Respectfully submitted,

EDWARD R. HUGO
COUNSEL OF RECORD
HUGO PARKER, LLP
240 STOCKTON STREET, 8TH FLOOR
SAN FRANCISCO, CA 94108
(415) 808-0300
SERVICE@HUGOPARKER.COM

COUNSEL FOR PETITIONERS

OCTOBER 4, 2021