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November 1, 2021

Letter supporting petition for review
Cal. Rules of Court, rule 8.500(g)

The Honorable Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAlister Street
San Francisco, California 94102-4797

Re: *Harris v. Thomas Dee Engineering Co.*
Supreme Court Case No. S271266

Dear Honorable Justices:

We write on behalf of the Association of Southern California Defense Counsel (the "Association") to urge this Court to grant review in this case. No party has paid for or drafted this letter.

The Association's Interest

The Association is among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 1,100 leading civil defense bar attorneys in Southern California. It is active in assisting courts on issues of interest to its members. It has appeared numerous times as amicus curiae in this Court and the Court of Appeal, most recently in *Gonzalez v. Mathis* (2021) 12 Cal.5th 29.

The Association's members regularly defend matters involving expert testimony. They routinely conduct discovery and based on the sworn discovery responses that they receive seek summary judgment for their clients in order to avoid the time and expense of trial. They are intimately aware of the discovery and summary judgment processes.

They have a direct interest that the law regarding expert discovery and summary judgment be consistently and fairly applied, with the object of determining and weeding out unsubstantiated claims.

Why Review Should Be Granted

Practical implications. The practical effect of the *Harris* opinion is that it will negate *ever* obtaining summary judgments in a broad swath of cases—those involving expert testimony, e.g., professional conduct claims, claims involving environmental injuries. Under *Harris*, an expert can *always* walk back or contradict his or her sworn deposition testimony if a summary judgment motion is brought. The practical effect is to categorically ban summary judgment based on deposition testimony by experts.

If experts can always walk back their sworn discovery testimony on summary judgment, opposing parties will refrain from bringing summary judgment motions or from pursuing pre-trial settlement. Instead, they will wait until trial to seek nonsuit or a directed verdict, likely coupled with a motion in limine to bind the expert to his or her deposition testimony. The result will be the same—a defense judgment. But forcing the parties to wait until trial will unnecessarily drain judicial resources, make litigation far more expensive, and unduly burden citizens called for jury duty.

Summary Judgment. Summary judgment has a valuable purpose. It allows parties to be free of unwarranted and unsubstantiated claims without the time and expense of trial. *And* it clears from court dockets non-meritorious cases that clog the judicial system and delay and impede the resolution of meritorious cases. Summary judgment is essential to judicial efficiency. It is "'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542, citations omitted.)

Are An Expert's Sworn Discovery Responses Binding? The predicate to summary judgment is discovery. Discovery matters. It is

how facts are established. If discovery is not binding, then the process is a waste of time.

Two key cases have long upheld these important principles, this Court's decision in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, and the Court of Appeal decision in *Jones v. Moore* (2000) 80 Cal.App.4th 557. In *D'Amico*, this Court held that for summary judgment purposes, witnesses are bound by their sworn testimony in discovery and cannot create a triable issue of fact by disavowing or contradicting such testimony. In *Jones*, the Court of Appeal held that an expert cannot provide new opinions that it failed to provide during discovery. Barring such testimony directly furthers the purpose of summary judgment, because trial courts are supposed to bar the introduction of such new testimony at trial or, at a minimum, have ample discretion to do so.

With a sweep of a hand, the Court of Appeal in the present case has swept aside these fundamental principles. Instead of re-affirming that what a witness, especially an expert witness, says or doesn't say in discovery matters, the Court of Appeal has held that this Court's binding precedent in *D'Amico* does not apply to expert witnesses and that experts are free at the summary judgment stage to change their opinions from what they stated in discovery. And, the decision holds that experts are *not* bound to their opinions given in discovery, undermining the very purpose of expert discovery.

The Court of Appeal's relies on the rationale that an expert who provides a new opinion can always be redeposed. But that proves too much, as the same is true of any witness. *D'Amico's fundamental premise* is that admissions in discovery should be binding at the summary judgment stage because made "in the context of an established pretrial procedure whose purpose is to elicit facts." (11 Cal.3d at p. 22.) That premise applies as equally to expert witnesses as it does to lay witnesses.

The Court of Appeal here also attempts to skirt *D'Amico* by claiming that the expert was only supplementing his opinion with an

additional theory. But factually that's wrong. The expert was *changing*—not merely supplementing—his opinion testimony. The expert at issue testified in his deposition that plaintiff was *not* exposed to asbestos if he was not in the room when the work was done. But in opposing summary judgment, the same expert declared a new theory that the plaintiff was exposed to asbestos if he was in the room within 72 hours after the work was done. The two statements are irreconcilable. The expert simply changed his theory, and added a new opinion, in an effort to forestall summary judgment based on his prior testimony. Such flip-flopping runs afoul of *D'Amico*.

Allowing an expert to posit a new theory *after* being deposed also runs afoul of *Jones*. The Court of Appeal dismisses *Jones* as only applying to trial testimony, not to an expert's contradiction of sworn discovery testimony at summary judgment; the Court again emphasizes the possibility of redeposing the expert. But under that rationale, *Jones* should not apply at trial either, because a trial can always be continued and an expert redeposed. And if experts are allowed to change course at any point until trial starts, then what's the point of expert discovery and how are parties supposed to work up their case?

Perry, *supra*, is consistent with *Jones*. In *Perry*, this Court held that an expert not properly disclosed could *not* be relied on in opposing summary judgment. *Perry* reasoned that the remedy is to seek relief from the nondisclosure, *not* to wait until a summary judgment motion is brought and present evidence *not admissible at trial*. Under *Jones*, expert opinions not disclosed at deposition are *inadmissible at trial*. The remedy is, and should be, that an expert must formally change his or her deposition opinions in correcting a deposition transcript or by motion *before* a summary judgment motion is brought. A trial court must have the same power to exclude deposition-contradicting expert opinions at summary judgment as it does at trial. The Court of Appeal's decision here creates a complete, irrational dichotomy. Experts who are not disclosed cannot be relied on to oppose summary judgment, but expert opinions that are not disclosed in sworn testimony *can* be relied on to oppose summary judgment.

Conclusion: Grant Review

This Court should grant review to resolve the important issues raised by this case. The Court of Appeal's decision threatens to make summary judgment impossible in cases involving expert testimony. Courts and litigants need clear, reasonable rules for both discovery and summary judgment—rules that make discovery meaningful and that let courts weed out non-meritorious cases at summary judgment. The Court of Appeal's decision does the opposite. Review should be granted.

Respectfully submitted,

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cc: See Attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is maguirre@gmsr.com.

On November 1, 2021, I served the foregoing document described as: **LETTER SUPPORTING PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

( ) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on November 1, 2021, at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Monique N. Aguirre
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California Court of Appeal First Appellate District, Div. Five
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