No. S233526

IN THE

SUPREME COURT OF CALIFORNIA

SWEETWATER UNION HIGH SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

GILBANE BUILDING COMPANY et al.

Defendants and Appellants.

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

OPENING BRIEF ON THE MERITS

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1. Issue Presented.

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

2. Statement of the Case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.2. The joint venture performed under the contracts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3. The contested criminal-case evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The hearsay rule, Evidence Code section 1200, applies to any "statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (See Evid. Code, § 1202 [hearsay declarant's