

FILED WITH PERMISSION

No. S259522

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

RAUL BERROTERAN
Petitioner

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,

Real Party in Interest

California Court of Appeal, Second District, Division One Civil No. B296639
Appeal from Los Angeles Superior Court, Case No. BC542525
Honorable Gregory Keosian, Judge Presiding

**APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE
CONSUMERS FOR AUTOMOBILE
RELIABILITY AND SAFETY, CONSUMER ACTION, CONSUMER
FEDERATION OF CALIFORNIA AND CALIFORNIA PUBLIC
INTEREST RESEARCH GROUP**

THE STURDEVANT LAW FIRM

A Professional Corporation
James C. Sturdevant (SBN 94551)
jsturdevant@sturdevantlaw.com
4040 Civic Center Drive, Suite 200
San Rafael, CA 94903
(415) 477-2410
Fax: (415) 492-2810

Counsel for Amici Curiae

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Petitioner, Raul Berroteran. This application is timely made within 30 days after the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amici brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae, their members, or their counsel in the pending appeal.

BACKGROUND OF AMICI CURIAE

Consumers for Auto Reliability and Safety (CARS) is a national non-profit auto safety and consumer advocacy organization based in Sacramento and dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses through legislative and regulatory advocacy, public education, outreach, aid to victims, and related activities.

CARS has been the official sponsor of multiple laws enacted in California to expand and improve protections under the Song-Beverly Consumer Warranty Act (“Act”) for consumers – including individual entrepreneurs, small business owners, and members of the Armed Forces –

from seriously defective and unsafe vehicles produced by unscrupulous auto manufacturers that engage in widespread fraud, deliberately fail to honor their warranties, and fail to make the necessary financial investments in designing and producing safe, reliable vehicles, developing diagnostic equipment, training qualified automotive technicians, establishing parts distribution systems, and producing adequate repair parts.

The President of CARS has been repeatedly invited to testify before the United States Congress and the California Legislature on behalf of the public interest, and served on an Advisory Committee to the Federal Trade Commission regarding auto warranties and state lemon laws, as a representative of the public interest.

Consumer Action has been an advocate for underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education and advocacy for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

Consumer Action also engages in educational programs, including investigations of consumer financial products and publishing the quarterly Consumer Action News and monthly newsletters for its members and others.

Consumer Action has long fought for ensuring that consumers have equal access to justice and to relevant, probative evidence, whether they are members of a class action, or they choose to opt out and pursue individual litigation.

The Consumer Federation of California is a nonprofit consumer advocacy organization based in California. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California legislature on dozens of bills that affect millions of our state's consumers. CFC also appears before state agencies in support of consumer regulations. For decades, CFC has worked to defend consumers' access to justice in open, public courts of law.

The California Public Interest Research Group (CALPIRG) is a consumer group that stands up to powerful interests whenever they threaten our health and safety, our financial security, or our right to fully participate in our democratic society. For more than forty years, CALPIRG has been an advocate for fair consumer protections, including upholding and strengthening the Song-Beverly Consumer Warranty Act. Headquartered in Sacramento, CALPIRG is supported by thousands of individual contributors across the state of California.

INTEREST OF AMICI CURIAE

The issues presented in this case implicate the interests of the millions of California consumers who bring lawsuits in California involving product liability. Amici have worked on behalf of, and count as members, consumers who care deeply about the origin of the products they buy, the cultivation and processing of the food they eat, and the consumption of the goods they purchase. The outcome of the evidentiary issues in this case will have a profound impact on California consumers' ability to obtain redress under state tort and consumer protection laws. Amici curiae and their members and clients have a very substantial interest in the present matter.

NEED FOR FURTHER BRIEFING

Amici are keenly aware of the issues before this court and the challenges facing consumers every day. Amici believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, in particular the public policy and interest ramifications of this case for the admissibility of deposition testimony from witnesses who are unavailable at trial. Consumers across California will be significantly affected by the Court's decision. The organizations that work with and represent those consumers can add substantially to the Court's analysis.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Chief Justice accept the accompanying brief for filing in this case.

Dated: November 20, 2020

Respectfully submitted,

The Sturdevant Law Firm
A Professional Corporation
4040 Civic Center Drive
Suite 200
San Rafael, CA 94903

By /s/ James C. Sturdevant
James C. Sturdevant

Counsel for Amici Curiae
Consumers for Auto Reliability and Safety
Consumer Action, The Consumer Federation
of California, and The California Public
Interest Group

No. S259522

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

RAUL BERROTERAN
Petitioner

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,

Real Party in Interest

California Court of Appeal, Second District, Division One Civil No. B296639
Appeal from Los Angeles Superior Court, Case No. BC542525
Honorable Gregory Keosian, Judge Presiding

**BRIEF OF AMICI CURIAE
CONSUMERS FOR AUTOMOBILE
RELIABILITY AND SAFETY, CONSUMER ACTION, CONSUMER
FEDERATION OF CALIFORNIA AND CALIFORNIA PUBLIC
INTEREST RESEARCH GROUP**

THE STURDEVANT LAW FIRM

A Professional Corporation

James C. Sturdevant (SBN 94551)

jsturdevant@sturdevantlaw.com

4040 Civic Center Drive, Suite 200

San Rafael, CA 94903

(415) 477-2410

Fax: (415) 492-2810

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
STATEMENTS OF INTEREST OF AMICI CURIAE	1
Consumers for Automobile Reliability and Safety	1
Consumer Action	2
The Consumer Federation of California	2
The California Public Interest Research Group	3
SUMMARY OF ISSUES AND ARGUMENT	3
ARGUMENT	7
I. PLAINTIFF SATISFIED THE EVIDENTIARY STANDARD THAT FORD HAD THE RIGHT AND OPPORTUNITY TO CROSS-EXAMINE THE UNAVAILABLE WITNESS.	7
II. PUBLIC POLICY AND THE PUBLIC INTEREST SUPPORT THE CONCLUSION THAT TRIAL COURTS MUST HAVE THE DISCRETION TO ADMIT THE TESTIMONY OF AN UNAVAILABLE WITNESS.	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
<i>Battle ex rel. Battle v. Memorial Hosp. at Gulfport</i> (5th Cir. 2000) 228 F.3d 544	9
<i>Berroteran v. Superior Court</i> (2019) 41 Cal.App.5 th 518	6, 10
<i>In re: Navistar 6.0L Diesel Engine Products Liability Litigation</i> , MDL No. 2223	4
<i>In re Tobacco II Cases</i> (2009) 46 Cal.4 th 298	12
<i>Hendrix v. Raybestos-Manhattan, Inc.</i> (11th Cir. 1985) 776 F.2d 1492	9
<i>Horne v. Owens-Corning Fiberglas Corp.</i> (4th Cir. 1993) 4 F.3d 276	9
<i>Murray v. Toyota Motor Distributors, Inc.</i> (9th Cir. 1982) 664 F.2d 1377	8
<i>People v DeHoyos</i> (2013) 57 Cal.4 th 79	8
<i>People v. Jackson</i> (2016) 1 Cal.5 th 269	8
<i>People v. Green</i> (1971) 3 Cal.3d 981	8
<i>People v. Sul</i> (1981) 122 Cal. App.3d 355	8
<i>Pointer v. Texas</i> (1965) 380 U.S. 400	8
<i>Romo v. Ford Motor Co.</i> 99 Cal.App.4 th 1115, <i>vacated in part on other</i> <i>grounds and remanded</i> (2003) 538 U.S. 1028	13
<i>Wahlgren v. Coleco Industries, Inc.</i> (1984) 151 Cal.App.3d 543	6

Statutes

Evidence Code § 403	8
Evidence Code § 1291(a)(2)	<i>passim</i>
Federal Rule of Evidence 804	8

Other Authorities

12A Bateman, et al., Fed. Procedure, Lawyer's Edition (8th ed. 2020 update) § 33:470	9
7 Graham, Handbook of Federal Evidence (8th ed.2019 update) § 804:1	9
Howard, "Appeals Court: Ford Committed Fraud by Selling Defective Super Duty Trucks, Detroit Free Press (Oct. 13, 2020)	13
2 McCormick, Evidence (8th ed. 2020 update) Hearsay, § 304	14

STATEMENTS OF INTEREST OF AMICI CURIAE

Consumers for Automobile Reliability and Safety

Consumers for Automobile Reliability and Safety (CARS) is a national non-profit auto safety and consumer advocacy organization based in Sacramento and dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses through legislative and regulatory advocacy, public education, outreach, aid to victims, and related activities.

CARS has been the official sponsor of multiple laws enacted in California to expand and improve protections under the Song-Beverly Act (“Act”) for consumers – including individual entrepreneurs, small business owners, and members of the Armed Forces – from seriously defective and unsafe vehicles produced by unscrupulous auto manufacturers that engage in widespread fraud, deliberately fail to honor their warranties, and fail to make the necessary financial investments in designing and producing safe, reliable vehicles, developing diagnostic equipment, training qualified automotive technicians, establishing parts distribution systems, and producing adequate repair parts.

The President of CARS has been repeatedly invited to testify before the United States Congress and the California Legislature on behalf of the public

interest, and served on an Advisory Committee to the Federal Trade Commission regarding auto warranties and state lemon laws, as a representative of the public interest.

Consumer Action

Consumer Action has been an advocate for underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education and advocacy for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

Consumer Action also engages in educational programs, including investigations of consumer financial products and publishing the quarterly Consumer Action News and monthly newsletters for its members and others.

Consumer Action has long fought for ensuring that consumers have equal access to justice and to relevant, probative evidence, whether they are members of a class action, or they choose to opt out and pursue individual litigation.

The Consumer Federation of California

The Consumer Federation of California is a nonprofit consumer advocacy organization based in California. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California

legislature on dozens of bills that affect millions of our state's consumers. CFC also appears before state agencies in support of consumer regulations. For decades, CFC has worked to defend consumers' access to justice in open, public courts of law.

The California Public Interest Research Group

The California Public Interest Research Group (CALPIRG) is a consumer group that stands up to powerful interests whenever they threaten our health and safety, our financial security, or our right to fully participate in our democratic society. For more than forty years, CALPIRG has been an advocate for fair consumer protections, including upholding and strengthening the Song-Beverly Consumer Warranty Act. Headquartered in Sacramento, CALPIRG is supported by thousands of individual contributors across the state of California.

SUMMARY OF ISSUES AND ARGUMENT

This case involves a defective diesel 6.0-liter engine in a 2006 Ford truck purchased by the Petitioner, Raul Berroteran ("Berroteran"). The appeal in this case involves the admissibility at trial of deposition testimony taken in a related case involving the same truck engine. These cases arose from multidistrict litigation filed in 2011 against Ford. Thirty-nine class and individual cases were transferred to the federal district court in Illinois and consolidated. MDL No.

2223, *In re: Navistar 6.0L Diesel Engine Products Liability Litigation* (the Class Action). The lawsuits involved claims by purchasers of vehicles equipped with an allegedly defective 6.0-liter diesel engine manufactured by Navistar. (1PE/25-26, 374.)

Berroteran was a putative class member in the multidistrict litigation because he purchased a 2006 Ford truck equipped with the defective engine, and he was a putative member of two California class actions and one federal class action that were consolidated into the master Class Action. (1PE/12-13, 24-37, 488-509.)

A master class action complaint (Class Action Complaint) was filed, alleging that Ford installed a defective 6.0-liter diesel engine in trucks and other vehicles between 2003 and 2007, and that the defects caused poor performance and safety hazards, among other damage (1PE/374-509.) The Class Action Complaint alleged that Ford concealed from consumers its inability to repair the engines. (1PE/396-403.) It further alleged that Ford committed fraud against all class members and sought compensatory and punitive damages. (1PE/456, 458.) Importantly, it alleged that Ford “knew from the outset that there were severe and pervasive design, manufacturing, and quality issues plaguing the Ford 6.0L Engines,” yet “never disclosed any of these issues to consumers” and instead made false representations to consumers about the engine. (1PE/387-388.) “No class

member knew, or could have known, about Ford's inability to repair the defects in its engines because . . . Ford kept this information highly confidential, sending internal warnings not to share this information outside of Ford." (IPE/404.)

The factual bases of Ford's misconduct are common to all class members. Concerning the defective nature of the 6.0 L engines, the Class Action Complaint alleged that Ford made uniform misrepresentations to and uniformly withhold material information from Plaintiffs and all class members. (IPE/446.)

Berroteran sought to admit at trial portions of five videotaped depositions taken in cases of two other purchasers who had opted out of the class action multidistrict litigation. Statements from this testimony were alleged with specificity in the Class Action Complaint. Transcripts reveal that Class Counsel intended to use these depositions at trial because they showed knowledge by key Ford employees of the defects in the engine.

These depositions were merits based videotaped depositions taken for potential use at trial. Ford assumed a risk in not cross examining these witnesses concerning any testimony it thought was inaccurate or additional testimony concerning the witnesses' factual knowledge. Because these individual cases emanated from multidistrict class action litigation, reasonable attorneys from Ford knew or should have known that under a variety of circumstances those videotaped depositions would be introduced as evidence if the witness became unavailable.

These included that the master class action was not certified, or it was certified and individual class members opted out of the proposed settlement as happened here,

This chain of events shows that counsel for Ford in the multidistrict litigation and individual cases was aware of the purposes of these depositions and made strategic decisions to cross examine some, but not all of Ford's deponents. Ford knew about the gravity of the testimony from both the allegations in the Class Action Complaint, the fact that the depositions were videotaped and that during the depositions counsel referred to the use of this testimony at trial.

The Court of Appeal below correctly determined that in considering the admissibility of deposition testimony from witnesses who are unavailable at trial, trial courts are to exercise their discretion based upon the factual showings made by the parties. *Berroteran v. Superior Court* (2019) 41 Cal.App.5th 518, 529. It correctly declined to follow *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 which held that courts may never admit prior deposition testimony from unavailable witnesses regardless of the factual circumstances presented.

Relevant to the issues in this appeal, Ford had both the right and opportunity to cross examine these witnesses at their depositions and the interest and motive to do so. It did so in the depositions of two other Ford witnesses deposed in other cases. Those are the very factors trial courts must consider in exercising their discretion under Evidence Code § 1291(a)(2) to permit the use of deposition

testimony from witnesses who are unavailable at trial. This is especially important in product liability cases in which the health and safety of consumers and their families and friends are at substantial risk.

ARGUMENT

I. PLAINTIFF SATISFIED THE EVIDENTIARY STANDARD THAT FORD HAD THE RIGHT AND OPPORTUNITY TO CROSS-EXAMINE THE UNAVAILABLE WITNESS.

Evidence Code § 1291(a)(2) provides that a party may introduce deposition testimony from an unavailable witness if the opposing party had “the right and opportunity” to examine that witness “with an interest and motive similar” to that which it has in the present trial or proceeding. This evidentiary standard has two components: (1) the right and opportunity and (2) the interest and similar motive. Both components are fact intensive.

Trial courts have broad discretion in applying the standards of section 1291(a)(2). “[A] trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception [citation] and ‘[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto’ [Citation.] [Appellate courts] review the trial court's conclusions regarding foundational facts for substantial evidence. [Citation. [and

its] ultimate ruling for an abuse of discretion [citations]” *People v DeHoyos* (2013) 57 Cal.4th 79, 132; *People v. Jackson* (2016) 1 Cal.5th 269, 320.

The proponent of admissibility has the burden of proof to demonstrate unavailability, the preliminary fact. Evidence Code § 403. The opposing party – because it controls the evidence and often the witness -- should have the burden to prove that the presumption of “interest and motive” should be overridden. That is the rule in criminal trials. *People v. Sul* (1981) 122 Cal. App.3d 355, 367, quoting *People v. Green* (1971) 3 Cal.3d 981, 999 (“Section 1291, subdivision (a)(2), of the Evidence Code does not require cross-examination as a prerequisite to admissibility. It is enough if defense counsel “. . . had the right and opportunity to cross-examine the declarant Whether or not a witness is actually cross-examined, the fact the defendant has an adequate opportunity to carry out such an inquiry satisfies the confrontation clause. *Pointer v. Texas* (1965) 380 U.S. 400, 407.”

While the burden question has not been resolved by this Court in the civil context with respect to section 1291(a) (2), courts construing its federal analogue, FRE 804, have adopted this position. First, it is indisputable that the inquiry under Rule 804 is fact intensive. As the Court of Appeal below concluded, federal cases construing 804 rely on the circumstances and evidence presented on the issues of interest and motive. See *Murray v. Toyota Motor Distributors, Inc.* (9th Cir. 1982)

664 F.2d 1377, 1379.) “[A]s a general rule, a party's decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude his adversary's use of the deposition at a subsequent proceeding.” *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506 (*Hendrix*); *see also Pearl v. Keystone Consolidated Industries, Inc.* (7th Cir. 1989) 884 F.2d 1047, 1052 (party who makes the decision not to cross-examine witness in deposition cannot complain that the failure to cross-examine renders the deposition inadmissible.) *Battle ex rel. Battle v. Memorial Hosp. at Gulfport* (5th Cir. 2000) 228 F.3d 544, 553 (“[d]efendants posit no argument that [the witness’s] deposition testimony lacked reliability” and “[t]hey do not suggest a single question or line of questioning that would have added reliability to the deposition”); *Horne v. Owens-Corning Fiberglas Corp.* (4th Cir. 1993) 4 F.3d 276, 283 (“the party against whom the deposition is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination.”)

Legal scholars agree with the analysis in these cases. *See* 2 McCormick, Evidence (8th ed. 2020 update) Hearsay, § 304; 7 Graham, Handbook of Federal Evidence (8th ed.2019 update) § 804:1; 12A Bateman, et al., Fed. Procedure, Lawyer’s Edition (8th ed. 2020 update) § 33:470 (“a party’s decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude the opposing party’s use of the deposition at a subsequent proceeding”).

Second, the court must determine whether the opposing party had the right and opportunity in the prior proceeding to cross examine the witness. Normally, either party can present evidence on this issue, particularly since the party offering the testimony has the deposition and/or videotape transcript. But the party offering the testimony of an unavailable witness at trial lacks the ability to demonstrate motive and interest of the opposing party, which is why the presumption is in place.

In this case, as the Court of Appeal made clear by canvassing the record on the briefing and argument on the in limine motions, Ford failed to demonstrate that it lacked the motive and interest to cross examine the witness. The record revealed that in two prior cases involving the same engine, Ford had actually examined two of its own former employees at their depositions. (1PE/766-768, 1582-1586); *Berroteran*, 41 Cal.App.5th at 525. Ford made a series of strategic decisions to examine some Ford deponents but not others. Because there is no dispute that Ford knew or should have known of the consequences of its strategic decisions with respect to the related litigation, it was not prejudiced. It should not be able to prevent the admission of the deposition testimony in *Berroteran*'s case. Thus, the Court of Appeal correctly concluded that Ford had failed to rebut the presumption that it had both the interest and motive to cross examine its own witness in his deposition in another, similar case involving the same diesel engine.

Moreover, Ford failed to demonstrate that it was prejudiced in any way if the deposition testimony was admitted. Ford sought to force each individual truck purchaser opt-out to have to incur the significant expense of re-deposing out of state witnesses for no reason (Ford has never shown it would do anything different). First, Ford could have mooted the entire hearsay issue simply by having the witnesses voluntarily appear live at trial. Second, Ford's position is that if the unavailable witness dies, then the testimony is lost forever. That position is untenable from a public policy standpoint. This is precisely why the hearsay exception for unavailable witnesses exists in section 1291(a)(2).

Conceptually, a trial is a search for the truth. With obvious limitations, the rules of evidence are structured around witness credibility which includes both demeanor and bias. Preventing a jury from hearing relevant evidence from a witness simply because that person is unavailable to testify live at trial should not prevent the admissibility of prior deposition testimony if the party opposing the introduction of evidence had a fair opportunity, motive and interest in cross examining that witness during his/her deposition but failed to do so.

II. PUBLIC POLICY AND THE PUBLIC INTEREST SUPPORT THE CONCLUSION THAT TRIAL COURTS MUST HAVE THE DISCRETION TO ADMIT THE TESTIMONY OF AN UNAVAILABLE WITNESS.

Independent of the plain language of section 1291(a)(2), public policy and the public interest compel the conclusion that prior testimony of an unavailable witness should be admissible in a subsequent proceeding or trial. Product liability litigation, like litigation involving drugs, tobacco and asbestos, transcend the individual litigants in specific cases. Evidence concerning what companies know and when they knew critical facts about the products are matters of public safety and national concern.

There are numerous examples in the past three decades which include litigation involving the sale and advertising of tobacco products generally and to minors in particular. Those demonstrated concerns arose from the disclosure that manufacturers of tobacco products had concealed from the public at large, Congressional committees and others of the personal and public health dangers from the use of nicotine. In recognition of those facts and the concerns that emanate from them this Court has imposed additional constraints on advertising relating to tobacco. In *In re Tobacco II Cases* (2009) 46 Cal.4th 298, the Court synthesized the essence of the fraudulent business practice as follows: the amended complaint alleged that the “[major] tobacco industry [companies] conducted a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease.” *Id.* at 306. This Court held that only the named class

representatives, not all class members, were required to demonstrate both injury in fact and reliance on the advertising campaign challenged as fraudulent under the Unfair Competition Law.

Similar determinations have been made in other product liability cases brought against automobile manufacturers, pharmaceutical companies and fertilizer companies involving faulty ignition systems, dangerous drugs and life-threatening chemicals. In these cases, courts have carefully weighed the public policy consequences of their rulings because the results affect peoples' lives and safety. For example, in a wrongful death case filed against Ford involving its 1978 Bronco, a jury, the trial judge and a unanimous court of appeal concluded that Ford not only knew that its truck would roll over and kill one or more of the occupants but actually succeeded in doing so. *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1141-1142, *vacated in part on other grounds and remanded* (2003) 538 U.S. 1028.

It is not simply the public exposure of what corporate entities knew and when they knew it about these defective products but the financial consequences for consumers who unwittingly use these products. With respect to the engine in question in this case, juries have awarded significant damages to vehicle owners like Berroteran who opted out of the class action and filed their own lawsuits. Three of those four jury verdicts yielded verdicts for fraud exceeding \$1 million.

(Petition ¶ 32; Ford Return, at 19 (admitting Petition ¶ 32)). The multidistrict class action against Ford, on the other hand, was settled in 2013 permitting class members to claim between \$50 and \$825 in reimbursement for post-warranty repairs. *See* Howard, “Appeals Court: Ford Committed Fraud by Selling Defective Super Duty Trucks, Detroit Free Press (Oct. 13, 2020).

The testimony from depositions that were used at trial in these and other cases inform the public not only about the degree of company knowledge of the nature and extent of the engine defect but the real likelihood of serious injury and death to those who purchase and use the products, including family members and friends. Preventing a jury from hearing and considering that testimony withholds from the fact-finding process relevant and probative evidence about the defect. It adversely affects the ultimate result, punishing the consumer purchaser for a strategic decision the company made in an effort to conceal the information from public scrutiny.

CONCLUSION

The plain language of Evidence Code § 11291(a)(2) requires the party opposing the admissibility of relevant deposition testimony from an unavailable witness to demonstrate that it did not have the opportunity, motive and interest to examine that witness during the deposition. Failure to make that factual showing

authorizes a trial court to exercise its discretion to admit that prior testimony. Prohibiting the admission of the deposition testimony as the trial court did here offends public policy and the public interest in permitting the jury to hear and consider that evidence. Amici respectfully request that the Court overrule the outdated decision in *Wahlgren* and affirm the decision below of the Court of Appeal.

Dated: November 20, 2020

Respectfully submitted,

The Sturdevant Law Firm
A Professional Corporation

By /s/ James C. Sturdevant
James C. Sturdevant

Counsel for Amici Curiae
Consumers for Auto Reliability and Safety
Consumer Action, The Consumer Federation
of California, and The California Public
Interest Group

CERTIFICATION

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d), I certify that this **AMICI CURIAE BRIEF** contains 3,736 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: November 20, 2020

/s/ James C. Sturdevant
James C. Sturdevant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MARIN

I am employed in the County of Marin, State of California. I am over the age of 18 and not a party to the within action; my business address is 4040 Civic Center Drive, Suite 200, San Rafael, California 94903.

On August 31, 2020, I served the foregoing document described as:

BRIEF OF AMICI CURIAE CONSUMERS FOR AUTOMOBILE RELIABILITY AND SAFETY, CONSUMER ACTION, CONSUMER FEDERATION OF CALIFORNIA AND CALIFORNIA PUBLIC INTEREST RESEARCH GROUP

on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) 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 20, 2020, at Los Angeles, California.

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

/s/ James C. Sturdevant
James C. Sturdevant

SERVICE LIST

KNIGHT LAW GROUP, LLP

*Steve B. Mikhov (SBN 224676)

stevem@knightlaw.com

Lauren A. Ungs (SBN 273374)

laurenu@knightlaw.com

10250 Constellation Blvd., Ste 2500

Los Angeles, California 90067

(310) 552-2250 / F: (310) 552-7973

Counsel for Respondent

Raul Berroteran

GREINES, MARTIN, STEIN

& RICHLAND LLP

*Cynthia E. Tobisman (SBN 197983)

ctobisman@gmsr.com

Nadia A. Sarkis (SBN 227778)

5900 Wilshire Boulevard, 12th Floor

Los Angeles, California 90036

(310) 859-7811 / Fax: (310) 276-526

ALTMAN LAW GROUP

*Bryan C. Altman (SBN 122976)

bryan@altmanlawgroup.net

Christopher J. Urner (SBN 311532)

c.urner@altmanlawgroup.net

10250 Constellation Blvd, Ste 2500

Los Angeles, California 90067

(310) 277-8481 / F: (310) 277-848

Counsel for Respondent

Raul Berroteran

Horovitz & Levy LLP

Frederic D. Cohen

Lisa Perrochet

3601 West Olive Avenue, 8th Fl

Burbank, California 91505

T: (818) 995-080

F: (844) 497-6592

fcohen@horvitzlevy.com

lperrochet@horvitzlevy.com

Counsel for Real Party Interest

Ford Motor Company

Hon. Gregory Keosian

c/o Frederick Bennett III

Superior Court of

Los Angeles County

111 North Hill St, Room 546

Los Angeles, CA 90012

fbennett@lacourt.org

pnguyen1@lacourt.org
[LASC Case No. BC542525]
Respondent

Justin H. Sanders
Darth K. Vaughn
Sabrina C. Narain
Sanders Roberts LLP
1055 West 7th Street, Ste. 3050
Los Angeles, California 90017
T: (213) 426-5000
F: (213) 234-4581
jsanders@sandersroberts.com
dvaughn@sandersroberts.com
snarain@sandersroberts.com
Counsel for Real Party Interest
Ford Motor Company

Matthew M. Proudfoot
Gates, O'Doherty, Gonter
& Guy, LLP
38 Discovery, Suite 200
Irvine, CA 92618
T: (949) 753-0255
F: (949) 753-0255
mproudfoot@g3pmlaw.com
Counsel for Real Party Interest
Ford Motor Company

CALIFORNIA COURT OF APPEAL
[Electronic Service under Rule 8.212(c)(2)]

STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
Supreme Court of CaliforniaCase Name: **BERROTERAN v. S.C. (FORD MOTOR COMPANY)**Case Number: **S259522**Lower Court Case Number: **B296639**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **jsturdevant@sturdevantlaw.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Berroteran v. Superior Court Amici Curiae Brief (002)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Allison Meredith Horvitz & Levy LLP 281962	ameredith@horvitzlevy.com	e-Serve	11/23/2020 10:20:53 AM
Frederic Cohen Horvitz & Levy LLP 56755	fcohen@horvitzlevy.com	e-Serve	11/23/2020 10:20:53 AM
Millie Cowley Horvitz & Levy LLP	mcowley@horvitzlevy.com	e-Serve	11/23/2020 10:20:53 AM
Steve Mikhov Knight Law Group, LLP 224676	stevem@knightlaw.com	e-Serve	11/23/2020 10:20:53 AM
Cynthia Tobisman Greines, Martin, Stein & Richland, LLP 197983	ctobisman@gmsr.com	e-Serve	11/23/2020 10:20:53 AM
Connie Gutierrez Faegre Drinker Biddle & Reath LLP	connie.gutierrez@db.com	e-Serve	11/23/2020 10:20:53 AM
J Warfield Polsinelli LLP 186559	jalanwarfield@polsinelli.com	e-Serve	11/23/2020 10:20:53 AM
Fred Hiestand Counselor at Law 44241	fhiestand@aol.com	e-Serve	11/23/2020 10:20:53 AM
Matthew Proudfoot Gates, O'Doherty, Gonter & Guy, LLP	mproudfoot@gogglaw.com	e-Serve	11/23/2020 10:20:53 AM
Cara Sherman ONGARO PC 269343	csherman@ongaropc.com	e-Serve	11/23/2020 10:20:53 AM
Julian Senior SJL Law. P.C	admin@sjllegal.com	e-Serve	11/23/2020 10:20:53 AM

219098			
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	11/23/2020 10:20:53 AM
Alan Lazarus Faegre Drinker Biddle & Reath LLP 129767	alan.lazarus@dbr.com	e-Serve	11/23/2020 10:20:53 AM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	11/23/2020 10:20:53 AM
Justin Sanders Sanders Roberts LLP 211488	breyes@sandersroberts.com	e-Serve	11/23/2020 10:20:53 AM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	11/23/2020 10:20:53 AM
Justin Sanders Sanders Roberts, LLP	jsanders@sandersroberts.com	e-Serve	11/23/2020 10:20:53 AM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	11/23/2020 10:20:53 AM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	11/23/2020 10:20:53 AM
Alan Dell'ario Attorney at Law 60955	charles@dellario.org	e-Serve	11/23/2020 10:20:53 AM
Nadia Sarkis Greines, Martin, Stein & Richland LLP 227778	nsarkis@gmsr.com	e-Serve	11/23/2020 10:20:53 AM
John M. Thomas Dykema Gossett 266842	jthomas@dykema.com	e-Serve	11/23/2020 10:20:53 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/23/2020

Date

/s/James Sturdevant

Signature

Sturdevant, James (94551)

Last Name, First Name (PNum)

The Sturdevant Law Firm, APC

Law Firm