F062211

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

AARON REVIOUS, et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Respondent.

APPEAL FROM KINGS COUNTY SUPERIOR COURT
STEVEN BARNES, JUDGE • CASE NO. 08C0703

RESPONDENT'S BRIEF

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FORD MOTOR COMPANY

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, **Fifth** APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: F062211
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Mary-Christine Sungaila 156795 Snell & Wilmer L.L.P. 600 Anton Blvd #1400 Costa Mesa CA 92626 TELEPHONE NO.: 714-427-7000 FAX NO. *(Optional)*: 714-427-7799 E-MAIL ADDRESS *(Optional)*: mcsungaila@swlaw.com ATTORNEY FOR *(Name)*: Ford Motor Company	Superior Court Case Number: 08C0703 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Revious, et al. RESPONDENT/REAL PARTY IN INTEREST: Ford Motor Company	

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2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) State Street Corporation	Owns more than 10% of Ford's stock
(2)	
(3)	
(4)	
(5)	

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Date: January 30, 2012

Mary-Christine Sungaila
(TYPE OR PRINT NAME)

▶ Mary-Christine Sungaila
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INTRODUCTION

By a near-unanimous 11-1 vote, a jury rejected Aaron and Cobi Revious' claims against Ford under the Song-Beverly Consumer Warranty Act for the alleged failure to repair recurring engine problems with their Ford F-250 truck in accordance with the vehicle's express warranty. The Reviouses seek to overturn that judgment, arguing that the trial court's discretionary exclusion of testimony about particular problems they claimed to still have with the vehicle, as well as a November 2010 inspection by their expert – performed nearly 21,000 miles after the vehicle's last repair and nearly a year after the warranty expired – made a difference in the judgment.

This court should affirm the judgment. The trial court properly exercised its discretion under Evidence Code section 352 to exclude both the inspection and the plaintiffs' testimony because (1) the relevance of this evidence was tenuous, (2) the potential for prejudice outweighed its probative value, and (3) the evidence was cumulative of other testimony the Reviouses and their expert provided. Moreover, the exclusion of this evidence resulted in no prejudice because the Reviouses' expert still provided the jury his opinion that the truck was not permanently repaired, and the Reviouses also testified that, in their view, the vehicle continued to suffer from engine problems.

STATEMENT OF THE CASE

A. The Reviouses purchase their Ford pickup truck in December 2004. By 2009, they had driven over 72,000 miles and taken the truck in for repair multiple times.

Plaintiffs Aaron and Cobi Revious purchased a new vehicle from a local Ford dealership on December 12, 2004. (AA 17; 4 RT 583, 589.) The Ford F-250 crew cab had a diesel engine, seating to accommodate their entire family, and was capable of towing recreational vehicles. (4 RT 577-582.) The truck's diesel engine came with a five year or 100,000 mile warranty. (4 RT 584-585; 5 RT 823.)

In the first three years they owned the vehicle, they took it into a local Ford dealership for an oil leak, a coolant system recall, replacement of the alternator and battery, an illuminated check engine light, engine surges upon climbing hills, and a perceived lag in acceleration. (4 RT 593-606.) According to Aaron Revious, they began to experience engine starting and cranking difficulties in the fourth year of ownership. (5 RT 898-908.) In March 2008, the truck lost power and broke down on the side of the road on their annual trip to Las Vegas, and they were forced to tow the truck home from Barstow. (4 RT 606-609.) After this incident, Aaron Revious contacted the Ford customer hotline and asked Ford to replace the vehicle. (4 RT 611-613.) He was told that the vehicle did not meet the criteria for a buy back at that time. (4 RT 611-613.) Subsequently, however, Ford offered the Reviouses an extended service plan for the vehicle, which they accepted. (4 RT 620-621, 5 RT 920.)

The Reviouses continued to take the vehicle in for service due to concerns with the engine. (4 RT 617-625, 5 RT 801-805.) Sometimes the dealership was unable to verify their concerns because the problem would not repeat itself or the vehicle displayed no error codes. (4 RT 617-619, 623-624; 5 RT 809.) In March 2009 they had to leave the vehicle in Las Vegas because it failed to start, and the Ford dealership in Nevada ultimately replaced the wiring harness in the engine compartment. (5 RT 804-809.) At that point, the vehicle had 72,000 miles on it. (5 RT 912.) After this repair, the Reviouses never took the vehicle in for another repair (even though it remained under warranty until December 2009) because "the vehicle ha[d] somewhat been acting normal." (5 RT 811.) From March 2009 until the time of trial in December 2010, they had logged an additional 21,000 miles in the truck, traveling around town and to Oregon, Idaho, and the mountains. (5 RT 912.) Neither Aaron nor Cobi Revious, however, believed that the truck had been permanently repaired. (5 RT 811; 6 RT 1111-1113.)

B. The Reviouses seek damages under the Song-Beverly Consumer Warranty Act due to the truck's engine problems.

On December 11, 2008 – nine months after they first asked Ford to take the truck back – the Reviouses brought an action against Ford for violation of the vehicle's engine warranty under the Song-Beverly Act, seeking return of their investment in the vehicle and rescission of the sales contract.[1] (1 AA 16-19.) After

[1] The Song-Beverly Consumer Warranty Act, codified in sections 1790 through 1795.8 of the California Civil Code, represents the

filing the complaint, they continued to take the vehicle in for service until March 2009, when they felt the vehicle seemed to be acting normally again. (See *ante*, p. 3.)

C. Prior to trial, Ford successfully moves to exclude evidence of a 2010 post-litigation vehicle inspection. Plaintiffs' expert still testifies that, based on the repair history, the truck has not been permanently repaired.

Ford filed two motions in limine to exclude evidence of repairs made to the vehicle after the filing of the lawsuit in December 2008 and the expiration of the warranty in December 2009. (1 AA 24-26, 28-30.) Ford argued that such post-warranty and post-lawsuit repairs were not relevant or, at the very least, they should be excluded under Evidence Code section 352 because they would confuse and mislead the jury and unduly prejudice Ford. (1 AA 25, 29.) The Reviouses opposed the motions, arguing that the warranty did not expire in December 2009 because the engine problems were not repaired, and in any

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Legislature's response to the exploitation of express warranties in product advertising. (E.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 121.) Song-Beverly applies to consumer goods in general, but also encompasses the Tanner Consumer Protection Act, which specifically applies to new motor vehicles and is popularly referred to as the "Lemon Law." (*Id.*; Cal. Civ. Code §§ 1793.2, 1793.22.) The Act provides that where a manufacturer provides an express warranty for consumer goods such as a new motor vehicle, the manufacturer must repair any vehicle defects to conform to the accompanying express warranty within a reasonable number of attempts. Cal. Civ. Code § 1793.2(d)(2). If the manufacturer is unable to do so, the buyer is entitled to have the vehicle replaced or to be reimbursed for the cost of the vehicle. Cal. Civ. Code § 1793.2(d)(2).

event the repairs remained relevant to determining whether the vehicle had in fact been repaired prior to December 2009. (1 AA 32-35, 37-41.)

Ford further argued that the error codes from testing of the vehicle by plaintiffs' expert in November 2010 should also be excluded under Evidence Code section 352 because anything that happened at that time would be too far outside the warranty period and therefore irrelevant, highly prejudicial, and confusing to the jury. (See 4 RT 528-532.) In March 2010 – 12,000 miles after the last repair had been made to the vehicle – Ford's expert inspected it, with plaintiffs' expert observing, and both experts agreed the vehicle drove just fine and no error codes came up. (4 RT 528-530; 5 RT 911-912.) In November 2010, however – after thousands more miles were added to the vehicle – plaintiffs' expert tested the vehicle and reported that there were error codes for the fuel injectors, the check engine light, and lag on acceleration. (4 RT 528-530, 5 RT 911-912; 1 AA 47.)

Plaintiffs' counsel argued that the November 2010 test showed that the vehicle's problems could reoccur, even though they might appear to be fixed for a while. (4 RT 530.) The court excluded the results of the November 2010 examination by the expert under Evidence Code section 352, concluding that "[t]he relevance . . . is substantially tenuous. The prejudice is overwhelming. The confusion of the jury and the additional time that it would take to explain these issues away require that the court make [this] order." (4 RT 532.)

Plaintiffs' expert Daniel Calef, who had 35 years' experience with automobile repair, nonetheless testified that "there [was] no indication that the root cause and the root problems were ever actually addressed" and the vehicle had never been properly diagnosed and repaired. (5 RT 945, 984, 986-987, 989.) He based this opinion on the type of engine involved, his review of the vehicle's service records, and Aaron Revious' assertions that the vehicle was still acting up. (Ibid.) Calef also explained that, while there were no error codes or problems during the March 2010 inspection, this was not surprising. (5 RT 982-985; see also 5 RT 992-993 [Calef further notes that Mrs. Revious, at the time of the March 2010 inspection, said that they would not find anything because the vehicle was not acting up at that time].) "One would reasonably expect the [vehicle] to work right, at least for a while [after the wiring harness repair], and it is not surprising to me that . . . you do an inspection . . . and right now the problems aren't there, . . . as you look through the history . . . what happens is problems keep reoccurring." (5 RT 983-984.) He stated that it was his understanding that the vehicle was currently in need of repair. (5 RT 986-987.)[2]

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[2] In contrast, Ford's expert James Reavill testified that the repairs had been successful and any past concerns had been resolved, given that he found no unresolved warranty concerns such as belt squeal, lack of power, or drivability concerns during his inspection and test drive in March 2010. (6 RT 1161-1163.) He noted that a lag at stop lights is normal for a six liter diesel engine like this one. (6 RT 1160.) He also confirmed Calef's assertion that there were no error codes present or stored at the time of the March 2010 inspection. (6 RT 1148-1153.)

D. At trial, the Reviouses testify about continuing problems with the vehicle.

Aaron Revious also testified that, after March 2009, there was never any period when the vehicle was without problems. (5 RT 941.) Specifically, the vehicle lagged or delayed in starting when leaving a stop sign or light, and emitted an intermittent squealing noise. (4 RT 604-605, 606; 5 RT 811, 941-942.) Cobi Revious similarly testified that the truck still was not fixed, the engine problems they had with the vehicle were not normal, and she would not consider reselling the vehicle because "you can't trust it" and if they sold it to someone else "they [w]ould [in turn] have problems." (6 RT 1111-1113.)

E. The Reviouses unsuccessfully move to exclude a March 2010 inspection by Ford's expert, which their own expert observed. The trial court excludes some testimony by the Reviouses about continuing problems with the vehicle.

After the court excluded the November 2010 error tests, plaintiffs made their own request to exclude the March 2010 inspection by Ford's expert, an inspection their own expert had attended and agreed with. (5 RT 859-865.) The Reviouses argued that if the November 2010 inspection were irrelevant because it was outside the warranty period, so too was the March 2010 inspection. (Ibid.) The court explained that the warranty timeframe had nothing to do with the court's earlier ruling excluding the November 2010 error code report. (5 RT 866.) The court characterized the ruling excluding the November 2010 error codes as being based on a timeliness issue, as well as concern

about undue prejudice to Ford and potential jury confusion. (5 RT 866.) The court deemed the March 2010 inspection "relevant" and noted: "[Aaron Revious] has testified this morning, and partly yesterday, that he continues to have difficulty with the vehicle. Whether or not somebody put an instrument on it and checked it with a code may have some relevance on that particular issue, but it is something the defendant should have more notice of than what they did. . . ." (5RT 866-867.) The court denied plaintiffs' motion to exclude the March 2010 inspection. (5 RT 867.)

Following denial of the motion, plaintiffs' counsel asked the court about its limitations on Aaron Revious' testimony about the current condition of the vehicle. Earlier that day, the court had sustained an Evidence Code section 352 objection by Ford's counsel to Revious testifying about current problems with the vehicle (5 RT 811), even though Revious had just testified that he believed the truck had not been permanently repaired (5 RT 811) and the previous day he had talked about continuing problems with a squealing noise and a lag in acceleration (4 RT 604-605, 606). The court explained that he had sustained defense counsel's objection because he was concerned that Mr. Revious was going to begin discussing the excluded November 2010 inspection. (5 RT 876-877.) He agreed with plaintiffs' counsel that the Reviouses' discussion of the current condition of the vehicle would be relevant. (5 RT 877-878.) Indeed, on redirect,

Aaron Revious testified again about specific continuing problems with the vehicle after March 2009. (5 RT 941.)[3]

F. The jury returns a verdict in Ford's favor, concluding by a vote of 11 to 1 that Ford repaired the vehicle to match its written warranty after a reasonable number of repair attempts.

The jury returned a verdict in favor of Ford, finding, by a vote of 11 to 1, that "Ford Motor Company or its authorized repair facility [did not] fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so." (1 AA 12, 82, 124.) The court entered judgment in Ford's favor. (1 AA 81-83.)

The Reviouses filed a motion for new trial, citing the exclusion of their expert's 2010 inspection and limitations on the Reviouses' own testimony about the current perceived condition of the vehicle. (1 AA 89-100.) Ford opposed the motion, arguing that the inspection was too far outside the warranty period to be relevant, that admission of the inspection would have prejudiced Ford and confused the jury as to the length and scope of the warranty, and that in any event exclusion of the inspection would have made no difference in the outcome of the trial. (1 AA 127-

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[3] The trial court similarly allowed Cobi Revious to testify about whether she thought the truck was permanently fixed, but sustained an objection to her describing details of the problems she was currently experiencing with the truck. (6 RT 1111-1113.) She nonetheless was permitted to testify that she did not trust the vehicle because of its engine problems, and they did not take trips by themselves anymore due to concerns about the vehicle's reliability. (6 RT 1113.)

134.) The motion was denied by operation of law due to expiration of the jurisdictional timeframe to rule. (1 AA 14.)

G. The Reviouses appeal.

On March 25, 2011, the Reviouses filed a notice of appeal from the judgment. (1 AA 144.)

LEGAL DISCUSSION

I

STANDARD OF REVIEW

"A ruling excluding evidence under Evidence Code section 352 will be overturned on appeal only if the trial court 'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1310, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Under the abuse of discretion standard of review, appellate courts will disturb discretionary trial court rulings only upon a showing of "a clear case of abuse" and "a miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566.) Discretion is "abused" only where the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham, supra*, 2 Cal.3d at p. 566.)

II

THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY ABOUT ERROR CODES FROM A NOVEMBER 2010 POST-WARRANTY TEST OF THE REVIOUSES' TRUCK AND A ONE-TIME LIMITATION ON THE REVIOUSES' OWN TESTIMONY CONCERNING CONTINUING PROBLEMS WITH THE TRUCK DOES NOT REQUIRE REVERSAL OF THE JUDGMENT.

A. The trial court properly exercised its broad discretion under Evidence Code section 352.

The Reviouses argue that evidence concerning a November 2010 error code test and additional testimony from the Reviouses about continued perceived problems with the truck were relevant and should have been admitted. (See AOB 16-18, 27-28.) "But 'the trial court has broad discretion to exclude otherwise relevant evidence under Evidence Code section 352'" (*Thompson v. County of Los Angeles* (1985) 142 Cal.App.4th 154, 171), and no party has the right to the unfettered presentation of possibly relevant evidence without regard to the mandate of section 352 (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553).

Evidence Code section 352 provides that a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "If the probative value is slight and the potential for prejudice great, the evidence should be excluded even if [it is] otherwise admissible." (*People v. Moten* (1991) 229 Cal.App.3d 1318, 1325.)

"The two crucial components of section 352 are 'discretion,' because the trial court's resolution of such matters is entitled to deference, and 'undue prejudice,' because the ultimate object of the section 352 weighing process is a fair trial." (*People v. Harris* (1998) 60 Cal.App.4th 727, 736.) The discretion to be exercised is "a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Id.* at p. 737.) The trial court's exercise of discretion in excluding evidence under Evidence Code section 352 will not be overturned on appeal unless "the trial court 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Espinoza, supra*, 95 Cal.App.4th at p. 1310.)

"A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not to be set aside on review." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.) A trial court's exercise of discretion will be upheld even if it does not explain its reasoning, so long as the record reflects that the trial judge engaged in the appropriate weighing process. (*See People v. Triplett* (1993) 16 Cal.App.4th 624, 627; *People v. Williams* (1997) 16 Cal.4th 153, 213.)

Here, the trial court excluded evidence both because of undue prejudice and jury confusion. Either one of these bases is sufficient to uphold the judgment.

1. Prejudice outweighed probative value.

As the Supreme Court has observed: "[W]e rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) "'Prejudice' in the context of Evidence Code section 352 refers to the possibility of misuse of the evidence – use of the evidence by the trier of fact for a purpose for which the evidence is not properly admissible." (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.) Thus, "Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.)

"Evidence is substantially more prejudicial than probative . . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, citations omitted.) "*Undue*

prejudice [also] springs from evidence which has very little effect on the issues." (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575, internal quotations omitted, emphasis in original.)

Here, the trial court determined that the relevance of the November 2010 error codes was "substantially tenuous." (4 RT 532.) Indeed, the codes resulted from a test done nearly one and one-half years and nearly 21,000 miles after the last vehicle repair, and almost a year after the warranty had expired. Nine months earlier, however, an inspection produced no error codes and the vehicle was operating normally. The trial court determined that potential prejudice was "overwhelming." (4 RT 532.) The November 2010 error codes – produced thousands of miles after the last repair, and during a timeframe in which the Reviouses never took the truck to a Ford dealership – had little effect on the issue of whether Ford had properly repaired the vehicle after having had a reasonable number of attempts to do so during the warranty period. Introducing those codes posed a risk to the fairness of the proceedings as well: this evidence could have invited the jury to punish Ford for entirely new problems that were separate and independent from those presented during the warranty period. The November 2010 codes and detailed testimony by the Reviouses about the current problems they claimed to have with the vehicle also could have caused the jury to exhibit an emotional bias against Ford and find Ford liable for problems it was never given the opportunity to repair. (See 1 AA 1393-1401 [special verdict form].) The trial court did not abuse

its discretion in determining that the prejudice from this evidence outweighed its probative value.

Plaintiffs argue that because the trial court subsequently gave an alternative reason for its ruling, it abused its discretion. (AOB 19-24.) In retrospect, the trial court characterized its ruling in much the same way as it did at the time it originally excluded the error code evidence: the ruling was based on a concern for undue prejudice and potential jury confusion. (5 RT 866.) In denying plaintiffs' subsequent motion to exclude the March 2010 inspection, however, the trial court observed that another basis for excluding the November error codes was a "timeliness" and fairness issue: Ford did not have sufficient notice of the November inspection, whereas both sides' experts had notice of and attended the March inspection. (5 RT 866-867.) There is nothing "patently absurd" about the court noting the differences between the two inspections, and nothing in the court's retrospective analysis undermines its determination that prejudice from the admission of the November error codes outweighed their probative value. [4]

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[4] The Reviouses also appear to complain that the court's rulings were not evenhanded because the March vehicle inspection came in, while the November one was excluded. (See AOB 21, fn.6.) Essentially, they are claiming that once the court permits some evidence of a certain type, all evidence of that type must be admitted. There is no authority to support this proposition and, in fact, the court must look to each piece of evidence individually and apply the section 352 balancing test to determine admissibility. See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1851-1852, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 (conducting separate section 352

2. Additional testimony by the Reviouses and the November 2010 error code evidence would have been cumulative and confusing.

A trial judge also has discretion to exclude evidence that is cumulative under section 352 "to avoid confusing the jury or wasting the time of the court." (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 7; *see Cubic Corp. v. Marty* (1986) 185 Cal.App.3d 438 [where evidence on an issue had already been presented, further evidence to prove the same issue was properly excluded as unduly time-consuming]; *Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038 ["A trial court acts within its discretion when excluding cumulative and time consuming evidence"]; *People v. Thornton* (2000) 85 Cal.App.4th 44, 47-48 [noting "the trial court's considerable discretion under Evidence Code section 352" to exclude cumulative evidence]; *Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371 [exclusion of evidence that has only a cumulative effect will not justify reversal on appeal].) In particular, the trial court must also "be mindful of the burden on the court system and on the jurors who are required to disrupt their lives for the duration of the trial" and take care to preserve the state's "strong interest in prompt and efficient trials, and that interest permits the nonarbitrary exclusion of evidence, including 'when the presentation of the evidence will necessitate undue consumption of time.'" (*People v. Williams* (2009) 170 Cal.App.4th 587, 610-611.)

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analyses for both disputed videotape evidence and evidence of statements by defendant).

Evidence is cumulative if it is repetitive of evidence already before the jury. (*People v. Evers* (1992) 10 Cal.App.4th 588, 599, fn.4.) Here, the Reviouses had already testified about the continued problems they believed the truck exhibited, even after the last repair in March 2009.[5] More of the same type of testimony would have been cumulative. (See *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1361 [additional witness testimony about collapsing evidence due to plumbing leaks was properly excluded].) Likewise, the November 2010 error code testing itself – which was duplicative of expert testimony that the truck still suffered from a defect and gave rise to the same inference that the vehicle had only temporarily been repaired – was also cumulative. (See *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495 [overturning trial court's refusal to exclude gang membership evidence in part due to its cumulative nature: "[e]vidence of a 'relationship' between a witness and a party is admissible to show bias . . . . But when other evidence has established such a 'relationship,' then common membership evidence is cumulative and, if prejudicial, inadmissible"].)

In short, the November 2010 testing and additional testimony about perceived problems with the vehicle were properly excluded as cumulative evidence that would have confused and mislead the jury.

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[5] In their opening brief, plaintiffs assert that the trial court "simply refused to allow any plaintiff testimony speaking to [the post-warranty] condition" of the vehicle. (AOB 27.) Not so. As noted earlier (ante, pp. 6-7), the Reviouses testified both

B. In any event, the trial court's exclusion of this testimony did not prejudice the Reviouses.

"Erroneous exclusion of evidence is grounds for reversal if in light of the entire record '. . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 254, ellipsis in original.) Here, the November 2010 error code evidence and one or two more statements by the Reviouses about continuing difficulties they claimed to be having with the vehicle would have made no difference in the outcome.

The Reviouses' expert still provided his opinion that the truck was not permanently repaired, and the Reviouses themselves testified to their view that the vehicle continued to suffer from the same problems. (See *Baker v. Beech Aircraft* (1979) 96 Cal.App.3d 321, 334, 337 [declining to reverse based on exclusion of evidence, noting that "[t]he Wall Street Journal article and the GAO Report contained little, if any, information not contained in other documents already admitted;" "the plaintiffs could not have been prejudiced by exclusion of the article because almost all of the documents and events discussed in the article were otherwise admitted into evidence"]; *Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 808-809 [trial court did not abuse its discretion in excluding evidence under section 352 where the excluded testimony bore

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generally and about specific aspects of their perceived continuing problems with the vehicle.

some relevance to material issues in the case, but the matters sought to be shown thereby were subject to proof by other evidence that was either more directly relevant or less prejudicial or both].) The jury simply disagreed, finding by a vote of 11 to 1 that Ford had repaired the vehicle in accordance with the written warranty after having had a reasonable number of opportunities to do so.

C. The reversible per se standard does not apply where, as here, a party is not entirely precluded from presenting evidence on a theory at trial.

Where the effect of a trial court's erroneous exclusion of evidence is to prevent a party from offering any evidence to establish one of its core theories, and thereby results in denial of a fair hearing, "the error is reversible per se." (*Kelly v. New West Fed. Sav.* (1996) 49 Cal.App.4th 659, 677.) Thus, "[t]he erroneous denial of some but not all evidence relating to a claim [citations] differs from the erroneous denial of all evidence relating to a claim, or essential expert testimony without which a claim cannot be proven [citations]. In the former situation, the appellant must show actual prejudice; in the latter situation, the error is reversible per se." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal. App. 4th 1103, 1115.)

The Reviouses argue that the reversible per se standard applies here. It does not. They were not entirely denied the right to present admissible evidence on their theory that the vehicle continued to have problems; to the contrary, the Reviouses

themselves described continuing problems they saw and their expert provided his opinion that the vehicle had never permanently been fixed. Moreover, the quality of the 2010 error code evidence was not so significantly different from the testimony of plaintiffs' expert that the jury did hear so as to render the trial fundamentally unfair. (See *People v. Williams, supra,* 170 Cal.App.4th at, 612 [declining to apply constitutional error standard in lieu of *People v. Watson* standard].) Accordingly, they must – but cannot – show prejudice in order to obtain a reversal.

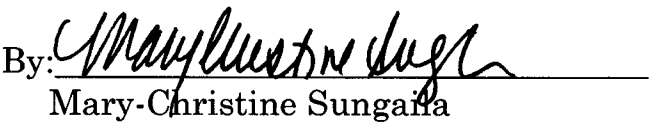
III

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Dated: January 31, 2012

SNELL & WILMER L.L.P.

By: 

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 5,048 words, exclusive of the matters that may be omitted under rule 8.204(c).

Dated: January 31, 2012

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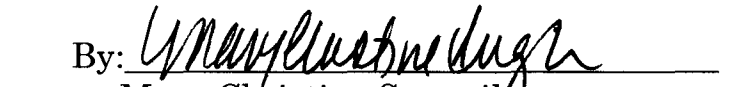
By: 

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On January 31, 2012, I served, in the manner indicated below, the foregoing document described as **Respondent's Brief** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)), as indicated on the service list.

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

Executed on January 31, 2012, at Costa Mesa, California.

Sandy Cairelli

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