ASCDC
Association of Southern California Defense Counsel

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May 5, 2020

Presiding Justice Elwood Lui
Associate Justice Judith Ashmann-Gerst
Associate Justice Victoria M. Chavez
Second Appellate District, Division Two
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, California 90013

Re: ***Waller v. FCA US LLC, et al.***
Court of Appeal Case No. B292524
Request for Publication; Opinion filed April 16, 2020

Dear Presiding Justice Lui, Associate Justice Ashmann-Gerst, and Associate Justice Chavez:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests that this court publish its April 16, 2020, opinion in *Waller v. FCA US LLC* (Apr. 16, 2020, B292524) [nonpub. opn.], which addresses a recurring issue that is central to the profusion of lemon law cases pending in the trial courts and is highly instructive in other expert-intensive cases as well.

ASCDC is the nation's preeminent (and largest) regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the civil defense bar's leading trial and appellate lawyers. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae. ASCDC has an interest in the publication of this court's opinion because many of its members specialize in defending cases brought under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) or other cases in which expert testimony is offered to support causation theories.

ASCDC seeks publication of the court's opinion because it provides needed guidance to trial courts faced with analyzing the admissibility of expert opinions under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770-771 (*Sargon*), which held that Evidence Code section 801, subdivision (b) prohibits an expert witness from offering opinions based on speculation or conjecture, or which are otherwise devoid of foundation.

First, the opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, rule 8.1105(c)(2).) The decision affirms the trial court's exclusion of expert testimony that a certain consumer product component (the fuel pump relay in a Dodge Durango) was only a possible (not a probable) cause of the claimed product defect, because such testimony was too speculative to assist the trier of fact. (Typed opn. 2, 9-10.) This is a scenario that has played out in hundreds of California lemon law cases involving the particular expert involved in this case (Anthony Micale), as well as a handful of other experts whose ready willingness to engage in a loose causation analysis has made it all but impossible to meaningfully evaluate case values and either settle meritorious cases or obtain summary disposition of unmeritorious ones. And yet, we are aware of no published opinions in vehicle warranty/lemon law cases that address the exclusion of expert evidence under *Sargon*, even though such cases represent approximately 10 percent of Los Angeles County's civil case docket alone. (Hon. Richard L. Fruin, Jr., *Nudge Statutes and Demurrer Filings at Stanley Mosk Courthouse*, Daily Journal (Jan. 8, 2019) <https://www.dailyjournal.com/articles/350763-nudge-statutes-and-demurrer-filings-at-stanley-mosk-courthouse> [as of Apr. 29, 2020]; cf. *Grodzitsky v. American Honda Motor Co., Inc.* (9th Cir. Apr. 29, 2020, No. 18-55417) __ F.3d ___ [2020 WL 2050659, at p. *7] [affirming exclusion of expert in lemon law case, under analogous federal *Daubert* standard, because opinion lacked supporting studies or testing and utilized deficient methodology].)

Second, publication is warranted because the court's opinion "[m]odifies, explains, or criticizes with reasons given, an existing rule of law" and "[a]dvances a new interpretation, clarification, criticism, or construction of a . . . statute." (Cal. Rules of Court, rule 8.1105(c)(3) & (4).) The opinion explores the interplay between cases limiting the impact of speculative causation evidence and *Sargon*'s holding that Evidence Code section 801 prohibits expert testimony based on speculation. The opinion draws support from *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403 (*Jones*)—decided in the nonsuit context—because there appear to be no published appellate opinions excluding expert testimony during trial

as speculative under *Sargon* where the expert's opinion is based on mere possibility rather than probability. This is a helpful clarification in cases far beyond the lemon law context.

Consistent with this court's opinion, the *Jones* court explained that a "possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action"; thus, evidence of probability "is the outer limit of inference upon which an issue may be submitted to the jury." (*Jones*, *supra*, 163 Cal.App.3d at p. 403.) This court's opinion warrants publication because it logically extends the same causation analysis to a trial court's gate-keeping role under *Sargon* during the trial itself. (See typed opn. 9-10.) In other words, publication would help further define a trial court's gatekeeper function under Evidence Code section 801, which requires the exclusion of expert opinions that do not satisfy the minimal requirement of probability.

Third, this court should order publication of its opinion because it "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).) Expert opinions are given tremendous weight in legal decisions impacting the public, particularly in cases involving consumer products like automobiles. By publishing the opinion, this court would maintain public perceptions regarding the integrity of the legal system by reaffirming the high standards required for admitting expert testimony.

Fourth, the decision should be published because it would helpfully remind trial court judges of their important responsibility to exclude speculative expert testimony. Expert testimony can be especially persuasive to jurors and therefore is often outcome determinative. Trial judges often resolve challenges to expert opinions by saying: "Let the jury decide" on the basis of the collective experiences of the jurors. But expert testimony should be admitted for the jury's consideration only on subjects beyond the "common experience" of jurors (Evid. Code, § 801, subd. (a)) and only if the trial judge has screened the testimony to ensure that it is not "junk science." "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials," and such evidence can have a "misleading aura of certainty." (*People v. Kelly* (1976) 17 Cal.3d 24, 31, 32, citations omitted, superseded by statute on another ground as stated in *People v. Wilkinson* (2004) 33 Cal.4th 821, 845-848.) Court oversight is necessary to prevent lay jurors from being improperly swayed by experts when their testimony is based on mere possibility:

> The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate, in language as conclusory as he may wish . . . .

> Once we recognize the expert witness for what he is, an unusually privileged interloper, it becomes apparent why we must limit just how far the interloping may go. A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.

(*People v. Johnson* (1993) 19 Cal.App.4th 778, 788-789, citation omitted (*Johnson*).) This court's decision provides assurance to trial courts that, when they exercise discretion to rein in speculative expert testimony, that discretion will not be second-guessed under the "let-it-all-in" approach that was all too common before *Sargon*.

Fifth, this court's opinion should be published because it provides useful instruction to trial courts and counsel regarding how expert testimony *should* be presented in lemon law cases. The opinion's very detailed analysis of the specific evidence in the case, the foundation proffered by the plaintiff's expert witness, and the particular portions of challenged testimony, all show how courts should apply admissibility rules in the lemon law context. Trial judges who roll up their sleeves, sort through the expert evidence, and make tough but necessary evidentiary calls before trial need to know their gatekeeping is serving a useful function.

Finally, as indicated above, the court should publish its opinion because it may encourage the settlement of lemon law cases at reasonable values, freeing up busy court dockets for trials in other cases. The recent surge in lemon law litigation may be the result of attorneys seeking to "run up hefty legal fees" by "overstaffing and dragging out cases." (Kyla Christoffersen Powell, *Calif. Auto Defect Law Incentivizes Overlitigation* (Apr. 7, 2020) Law360 <https://www.law360.com/articles/1259186/calif-auto-defect-law-incentivizes-overlitigation> [as of May 5, 2020].) Such overstaffing is facilitated by a stable of paid "expert" advocates like Mr. Micale, whose opinion as to the cause of problems in any particular vehicle often lack sufficient foundation. Publication of the court's decision here will help both plaintiffs and defendants understand that unsupported expert opinions will be excluded in *all* cases, including lemon law cases, thereby encouraging reasonable settlements and limiting the number of trials in which juries must struggle to discern between experts whose resumés suggest a false equivalency, even though one of them may actually be an advocate "masquerading" as an expert. (*Johnson*, *supra*, 19 Cal.App.4th at pp. 789-790, citation omitted.)

All in all, for the reasons explained above, this court's opinion meets the criteria for publication under California Rules of Court, rule 8.1105(c). ASCDC therefore urges this court to certify the decision for publication.

Respectfully submitted,

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PROOF OF SERVICE

Waller v. FCA US, LLC. et al.
Case No. B292524

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On May 5, 2020, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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

Executed on May 5, 2020, at Burbank, California.

Millie Cowley

Millie Cowley

SERVICE LIST

Waller v. FCA US, LLC. etal.
Case No. B292524

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