2d Civil No. B148400

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

EMILY GREINES,

Plaintiff and Appellant,

vs.

FORD MOTOR COMPANY, INC., etc., et al.,

Defendants and Respondents.

Appeal from the Los Angeles Superior Court,
Los Angeles Superior Court Case No. BC 210 565,
Honorable Robert A. Dukes, Judge
Honorable Carol Boas Goodson, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

On the evening of May 28, 1998, Emily Greines parked her leased 1998 Ford Explorer in front of her home, locked the car, removed the key, and retired for the evening.

The next morning her car was gone.

It had been stolen.

Three weeks later, the police recovered the car. It was parked five blocks from Emily's residence and was covered with parking tickets.

The car had been hot-wired: the ignition had been punched out and was lying on the floor, and the thief had been under the car's hood.

This wasn't supposed to happen. Ford had guaranteed that Emily's car (and others like it) could never be stolen in this manner. According to Ford, hot-wiring was impossible because the Explorer was equipped with a great security feature called the SecuriLock system.

Here's how Ford's sales brochure and owner's manual for the Explorer represented the benefits of the SecuriLock system:

> *"Unless your specially coded driver's key is used, the vehicle won't start."*

Before Emily leased the Explorer from the Walker-Buerge Ford dealership, she was told by her sales representative that the "SecuriLock" system prevented hot-wiring theft, that vehicles equipped with SecuriLock could not be started without using the specially coded key furnished with the vehicle. Emily confirmed these representations when she read the quote above in Ford's sales brochure prior to signing the lease and in the Explorer's owner's manual thereafter.

Emily justifiably relied on Ford's representations in deciding to lease the Explorer and in deciding not to equip her vehicle with other security features, such as the Club or LoJack.

Ford's representations were lies, and Ford knew they were lies. It had known since at least 1995 – years before Emily leased her Explorer –

that SecuriLock-equipped vehicles could, in fact, be started without the specially coded key. The record overwhelmingly demonstrates that this is so. For example:

- Ford engineer and SecuriLock creator David Treharne had known since at least 1995 that SecuriLock-equipped vehicles could be started and driven away – without use of the special key – in at least two different ways, via "limp away" mode or by "electronic bypass."
- In a 1997 patent application, Ford admitted its pre-1998 SecuriLock technology could be circumvented and its cars started and driven away without using the specially coded key. The patent application admitted: a "drawback" of the SecuriLock system is that the vehicle "may be moved a short distance before the engine is disabled by subsequent failure to detect a valid key code" and that "electronic[] tampering allow[s] a thief to drive a vehicle away, albeit with poor engine performance." Ford admitted this needed to be fixed and went to the trouble of filing a patent application to fix it.
- In December 1995, Treharne informed Ford management at a "cert review" meeting that the SecuriLock system needed to be improved to prevent circumvention by thieves who could start and drive cars in spite of the security system.
- Ford employee Tom Greene's SecuriLock-equipped vehicle was hot-wired in 1995, and he informed Treharne of the theft. In response, Treharne acknowledged that the likely method of theft was via the "limp-away" mode – in circumvention of SecuriLock.
- A document, dated February 1996 and produced by Ford during discovery, referred to two network television programs airing pieces on "How Theives (*sic*) are defeating the Ford Hi-Tech Security System" and Ford's subsequent "Damage

Control" through "PR and Advertising" in order to reverse a profound downturn in "probable customer perception."

- Emily's expert actually hot-wired a SecuriLock-equipped 1998 Ford Explorer without using the specially coded key. It took him two minutes to do it.

After her Explorer was stolen, Emily incurred $2,879.24 in expenses, including impound fees, repair fees, rental car fees and lease payments made while her vehicle was missing. She sent letters to Ford's and Walker-Buerge's highest executives. The letters explained what had happened, pointed out the falsity of Ford's representations and asked for reimbursement. Neither Ford nor Walker-Buerge ever bothered to respond to Emily's letter or sought to investigate why her SecuriLock system failed.

Emily sued Ford and Walker-Buerge (collectively, "Ford," except where the context requires otherwise) for compensatory and punitive damages for fraud, false advertising, unfair trade practices and related causes of action.

Incredibly, on the pleading and evidentiary record described, the trial court found – on demurrer and summary judgment – that Emily had no case! The trial court's rulings are indefensible.

In her First Amended Complaint, Emily pleaded – with specificity – each and every element of each and every cause of action she alleged; therefore, it was reversible error for the trial court (Judge Carol Boas Goodson) to dismiss *any* cause of action on demurrer. Likewise, the trial court (Judge Robert A. Dukes) prejudicially erred in awarding Ford summary judgment on the remaining causes of action, as triable issues of fact abound, especially when the evidence is viewed in the light most favorable to Emily, as the law requires.

Strong public policy compels that there be trials on the merits where any triable issue of fact exists. The erroneous rulings on both demurrer and summary judgment have resulted in a miscarriage of justice that affects not just Emily but the entire consuming public.

For years now, Ford has defrauded the public by peddling a security system that it knows does not work. The trial court's rulings here improperly deprived both Emily and the consuming public – over 1.4 million other customers whom Ford admits have purchased SecuriLock-equipped vehicles – of their right to have their day in court. The erroneous judgment permits Ford to get away with a pattern of fraudulent conduct that has betrayed the public.

The judgment must be reversed. All causes of action must be reinstated so that Ford is compelled to face trial for its mendacious conduct.

STATEMENT OF FACTS AND OF THE CASE

A. The Facts.[1]

1. Emily Greines Shops For A New Car.

In late 1997, Emily Greines was shopping for a new car. (Appellant's Appendix ["AA"] 94.) She considered the Nissan Pathfinder, Toyota 4Runner, Jeep Cherokee and Ford Explorer. (*Ibid.*)

2. Ford Represents–Without Qualification–That Its SecuriLock-Equipped Vehicles Can't Be Stolen By Hot-Wiring.

In researching her options, Emily paid a visit to Walker-Buerge, a Ford dealership. (AA 94.) There, she spoke with a sales representative and obtained and read Ford's promotional literature. (*Ibid.*)

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[1] Since this case involves an appeal from a judgment entered based on orders sustaining a demurrer without leave to amend and granting summary judgment, we recite the facts in the light most favorable to Emily. (E.g., *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521 ["'On demurrer, it is not the function of a trial court, or of this court, to speculate on the ability of a plaintiff to support, at trial, allegations well pleaded'"]; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [on review of summary judgment, evidence must be viewed in the light most favorable to the losing party].)

The sales brochure touted the benefits of Ford's SecuriLock system as follows:

> *Unless your specially coded driver's key is used, the vehicle won't start.*

(AA 94, 95.) The Explorer's owner's manual repeated the identical representation. (AA 94 ["SecuriLock protects against theft electronically. Unless your specially coded driver's key is used, the vehicle won't start"].)

When Emily inquired about the SecuriLock system, Ford's sales representative, Ron Kramer, told her that a SecuriLock-equipped vehicle could not be started or driven away by a thief or anyone else without the specially coded Ford key. (AA 94.)

3. Emily Leases A Ford Explorer And Forgoes Purchasing Other Security Options In Reliance On Ford's Representations About The SecuriLock System.

Based on these representations, Emily believed that one of the most common forms of car theft, namely hot-wiring, could not happen to a vehicle equipped with SecuriLock. (AA 95.) She believed this was an outstanding feature that would substantially reduce the risk that her car would be stolen. (*Ibid.*)

In reliance on these representations, Emily leased a new 1998 Ford Explorer from Walker-Buerge on November 29, 1997. (AA 95, 96.) Further, based on Ford's representations that her car could not be hot-wired, she declined to purchase additional security protections, such as the "Club" or "LoJack." (AA 96.)

4. Emily's Explorer Is Stolen Six Months After She Acquired It, And Retrieved Three Weeks Later.

On the evening of May 26, 1998, Emily parked her car in front of her home, removed her specially coded key, locked her car, and entered her

residence for the evening. (AA 92, 539.) The next morning, the car was gone.[2] (AA 92.)

Three weeks later, on June 17, 1998, the police found Emily's car parked five blocks away from her home, covered with parking tickets. (AA 92, 115, 540.)

5. The Physical State Of Emily's Car Upon Retrieval.

After locating the car, the police caused it to be towed to an impound lot. (AA 540.) When Emily retrieved her car from the impound lot, she observed its condition and immediately took photographs documenting her observations. (*Ibid.*) These photos show damage entirely consistent with a hot-wiring theft. (*Ibid.*) Specifically, the vehicle's ignition had been forcibly removed and was lying in pieces on the floor, and the car showed signs that the thief had been under its hood.[3] (AA 92, 111-112, 540, 545-547.)

6. Emily's Damages.

Emily's car was repaired at Harry's Auto Collision Center on July 23, 1998. (AA 541.) In all, Emily sustained $2,879.24 in damages as a result of the theft. Her losses were: $626.39 at Harry's Auto Collision Center; $164.85 in impound fees; $1,293.21 in car rental fees; $120 in parking fines; and $674.79 in lease payments she was required to make while she was without use of the Explorer. (AA 115-116.) She additionally suffered distress occasioned by the absence of her car, the

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[2] When she parked her car on the evening of the theft, Emily parked behind another vehicle. (AA 539.) The next day, the vehicle that had been parked in front of Emily's now-missing car was still in the same spot. (AA 540.) As Emily's expert later observed, pushing or towing a car away under such circumstances would be difficult and thus highly unlikely. (AA 553.)

[3] Repair records show that the master steering column ignition lock, the ignition lock cylinder, the lock cylinder kit, the steering column cover, the front door panel, the front door lock cylinder, and the battery trim cover were all repaired or replaced as a result of the theft. (AA 628-631.)

related red tape, and the need to devote some of her spare time to making up time she lost at work due to the theft. (*Ibid.*)

7. Emily Writes To Ford, Informing It That Her Car Had Been Stolen Because The SecuriLock System Failed To Work As Promised And Requesting Reimbursement Of Her Damages.

On August 31, 1998, Emily wrote to Alex Trottman, Ford's Chairman of the Board, Rob Goldsberry, Ford's Vice President of Customer Service, and John Buerge, President of Walker-Buerge. Her letter informed them that (a) her car had been started and stolen without use of the specially coded key, (b) the theft had been accomplished by hot-wiring the vehicle, (c) the method of theft violated and demonstrated the falsity of Ford's written and oral representations that vehicles equipped with the SecuriLock system could not be started or driven away without the specially coded key, and (d) she had suffered damages (as specified above) as a result of Ford's misrepresentations.

Emily asked Ford to reimburse her for her losses occasioned by Ford's misrepresentation of the SecuriLock system and the failure of that system to operate as Ford had advertised and promised. (AA 93.)

8. Ford and Walker-Buerge Stonewall.

Neither Ford nor Walker-Buerge ever responded to Emily's letter. (AA 93.) They never contacted Emily to investigate how or why their SecuriLock system failed in her case; they never sought to ascertain how such a problem might be corrected in the future. (*Ibid.*)

At no time has Ford offered to pay any of the expenses or losses Emily suffered as a result of the SecuriLock system's failure to work as guaranteed. (*Ibid.*)

Ford simply didn't care.

9. Emily's Expert Concludes Her Car Was Stolen By Hot-Wiring, And Successfully Hot-Wires Another SecuriLock-Equipped 1998 Explorer.

After Emily filed this lawsuit, her auto theft expert, Robert Painter, inspected her leased Explorer and the component parts that were recovered from its floor after the theft. (AA 545, 555-560.) He also reviewed the police report, the First Amended Complaint, the repair invoices, and three publicly-available Ford factory manuals that described, in detail, the method by which the SecuriLock system installed in 1998 Ford Explorers functions. (AA 545, 546.)

Based on his review and his training and experience in the area of auto thefts, Painter concluded that Emily's car most likely was started and driven away without use of the specially coded key. (AA 546.)

As part of his investigation, Painter successfully started a SecuriLock-equipped 1998 Ford Explorer – the same vintage as Emily's – by electrically bypassing the SecuriLock system with a small piece of wire. (AA 1345-1349.) It took him two minutes to do this. (AA 1348.) It's all shown on a videotape lodged with the trial court. (AA 1449 [Videotape Exhibit to Motion for Reconsideration ("Videotape Exhibit")].)

10. Ford's Knowledge That Its SecuriLock-Equipped Cars Can Be Started By Hot-Wiring.

The record in this case discloses that Ford had long known its representations about the SecuriLock system were lies. Among other things, the record shows:

- Ford engineer and SecuriLock creator David Treharne testified that SecuriLock-equipped vehicles could be started and driven away without the specially coded key. This could be accomplished, he admitted, in at least two different manners, including the "limp away mode" and electronic bypass methods. (AA 1034-1039; see also AA 618-622.)

- A Ford patent application admitted in 1997 that Ford was aware its pre-1998 SecuriLock technology could be circumvented and its cars started and driven without use of the specially coded key. (AA 1178, 1202 ["One drawback of (the SecuriLock) patent is that *the vehicle may be moved* a short distance before the engine is disabled by subsequent failure to detect a valid key code. It may also be possible to sustain operation with the engine in a start mode by electronical (*sic*) tampering, *allowing a thief to drive a vehicle away* (albeit with poor engine performance)" (emphasis added)].)
- A Ford "cert review" meeting (convened for the purpose of ensuring that Ford vehicles receive federal and California certification before being produced and sold to the public; see AA 1160) took place at which Ford engineer Treharne indicated that the SecuriLock system needed to be improved to prevent circumvention by thieves who could start and drive away SecuriLock-equipped cars in spite of the technology. (AA 620-621, 1160, 1165.)
- In 1995, years before Emily leased her Explorer, Ford employee Tom Greene's SecuriLock-equipped vehicle had been hot-wired and stolen from a secured parking lot in the middle of the day by thieves who simply drove it past the parking lot guards. Ford learned of this and Ford expert Treharne initially concluded the SecuriLock system was likely defeated via the "limp away" mode. (AA 618-622, 1160.)
- A 1996 graph created by Ford employee David Tengler referred to exposés on two network television shows ("Good Morning America" and the "Today Show") that reported "[h]ow theives (*sic*) are defeating the Ford Hi-tech Security System"; it referred to a nadir in "probable customer

perception" followed by and increase in public perception as a result of "Damage Control" through "PR and Advertising." (AA 1063-1064.)

B. The Lawsuit.

1. The Complaint.

On May 19, 1999, Emily timely filed this lawsuit against Ford. (AA 1.) She alleged causes of action seeking compensatory and punitive damages for fraud, negligent misrepresentation, false advertising/unfair trade practices [Bus. & Prof. Code, § 17200, et seq.], deceptive trade practices [Civ. Code, § 1750, et seq. (Consumer Legal Remedies Act)], failure to comply with warranty [15 U.S.C. § 2310(d) (Magnuson-Moss Act)], breach of express warranty, and negligence. (AA 1-16.)

2. Ford's Demurrer To The Original Complaint Is Sustained With Leave To Amend.

On September 30, 1999, Judge Carol Boas Goodson sustained Ford's demurrer with leave to amend. (AA 84.) In so doing, she concluded that the representations made in Ford's promotional literature and brochures (e.g., "unless your specially coded driver's key is used, the vehicle won't start") could not form the basis for a valid cause of action because, according to Judge Goodson, the representations were simply "puffing."[4]

3. Emily's First Amended Complaint.

Emily filed her First Amended Complaint on October 19, 1999. (AA 89.) It contained specific element-by-element recitals of the facts supporting each of her causes of action. These allegations are discussed in detail below in connection with the legal discussion pertaining to each cause of action.

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[4] Here's what Judge Goodson said: "I read it in your complaint. But that is not sufficient for the basis of a complaint here. You got to plead with more particularity. *[You] [c]an't say that it was a generalized brochure which they are indicating is a piece of basically puff salesmanship.*" (Reporter's Transcript ["RT"] F-2 to F-3, emphasis added.)

4. Ford's Second Demurrer Is Sustained Without Leave To Amend.

Ford again demurred, and Judge Goodson this time sustained the demurrer without leave to amend as to Emily's claims for fraud, negligent misrepresentation, violation of the Magnuson-Moss Act and breach of express warranty. The remaining causes of action (for false advertising/unfair business practices [Bus. & Prof. Code, § 17200, et seq.], deceptive trade practices [Civ. Code, § 1750, et seq.], and negligence) withstood demurrer. (AA 253.)

5. Ford Stonewalls Emily's Discovery And Fails To Timely Produce Responsive Documents.

Ford did everything in its power to stymie Emily's discovery efforts. Among other transgressions, it provided late and incomplete responses to document requests, refused to cooperate in informal efforts to schedule depositions, raised bogus objections to noticed depositions, and sandbagged by disclosing documents for the first time in a reply brief filed in support of its summary judgment motion under circumstances where it was legally obligated to have disclosed the documents months earlier. (E.g., AA 612-615, 1205-1213.)[5]

6. The Trial Court Awards Ford Summary Judgment As To Emily's Remaining Claims.

On October 10, 2000, after refusing to grant a continuance or to reopen discovery in response to Emily's request for relief from Ford's discovery abuses, the trial court granted Ford's motion for summary judgment as to Emily's remaining claims. (AA 1331; see AA 1183-1200 [motion to reopen discovery]; RT D-8 to D-9.)

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[5] The more complete story of Ford's obstructionist tactics and their bearing on the insupportable outcome below will be told in Section III, *infra*.

7. The Trial Court Denies Emily's Request For Reconsideration.

On October 16, 2000, Emily moved for reconsideration based on her expert Robert Painter's videotape showing him actually starting and driving a SecuriLock-equipped 1998 Ford Explorer without using the specially coded key. (AA 1337-1357, 1449 [Videotape Exhibit].) The trial court denied the motion. (RT E-7; AA 1421.)

8. Judgment Is Entered And Emily Timely Appeals.

On January 2, 2001, judgment was entered in Ford's favor. (AA 1431.) On February 23, 2001, Emily timely appealed from the judgment. (AA 1438-1443.)

The judgment is appealable because it finally disposes of all issues between the parties and from all orders or rulings necessary to, incorporated in or made final by that judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).)

LEGAL DISCUSSION

I.

THE PORTION OF THE JUDGMENT PREMISED ON THE ORDER SUSTAINING FORD'S DEMURRER WITHOUT LEAVE TO AMEND MUST BE REVERSED BECAUSE THE FIRST AMENDED COMPLAINT PROPERLY ALLEGED VIABLE CAUSES OF ACTION.

The trial court sustained Ford's demurrer to Emily's causes of action for fraud, negligent misrepresentation, violation of the Magnuson-Moss Act, and breach of express warranty. As we now demonstrate, Emily properly pleaded every element of each of these causes of action.

Ford's demurrer should have been overruled. The dismissed causes of action must be reinstated.

A. A Demurrer Admits The Allegations Of The Complaint And Only Tests Whether A Plaintiff Has Stated A Cause of Action.

A demurrer tests the sufficiency of pleading alone. So long as a plaintiff has stated a cause of action – any cause of action – a defendant's demurrer *must* be overruled. (E.g., *Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 307 ["If the factual allegations of the complaint are adequate to state a cause of action under any legal theory, the demurrer must be overruled"]; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459 ["a demurrer will be sustained only where the pleading is defective on its face"].)

On demurrer, the alleged facts must be accepted as true and all inferences must be drawn in favor of the plaintiff. "Neither trial nor appellate courts should be distracted from the main issue, or rather, the only issue involved in a demurrer hearing, namely, whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.) In deciding this narrow issue, the courts "must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the complaint." (*City of Atascadero, supra*, 68 Cal.App.4th at p. 459, citations omitted.) And, "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 214; see also *Strauss v. A.L. Randall* Co. (1983) 144 Cal.App.3d 514, 516 ["a reviewing court must regard the allegations as true and assume that plaintiff can prove all of the facts as alleged"].)[6]

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[6] Because review of a ruling on a demurrer presents a "pure legal question," the trial court's determination is entitled to "no deference" from a reviewing court. The trial court's discretion comes into play only in (continued...)

B. The Fraud Causes Of Action Were Properly Pleaded In The First Amended Complaint.

Emily's First Amended Complaint set forth claims for two species of fraud – intentional fraud and its cousin, negligent misrepresentation.

The elements of intentional fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. (*Shurpin v. Elmhirst* (1983) 148 Cal.App.3d 94, 101.) The elements of negligent misrepresentation are essentially the same, except that the scienter element is replaced by a requirement that the defendant's misrepresentation must have been made "without reasonable ground for believing it to be true . . . ." (E.g., *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285, citing *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1102 [same].)

Emily alleged each element of her two fraud causes of action more than sufficiently here.

1. The Element Of "Representation" Was Adequately Pleaded.

The First Amended Complaint alleged with specificity that Ford made each of the following representations:

- that Ford's official sales brochure, other promotional materials and owner's manual represented: *"Unless your specially coded driver's key is used, the vehicle won't start."* (AA 94-95, 118, 121.)

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[6] (...continued)
determining whether to grant leave to amend. (*Charpentier, supra*, 75 Cal.App.4th at p. 307 & fn.4; see also *City of Atascadero, supra*, 68 Cal.App.4th at p. 459 ["As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is abuse of discretion to sustain a demurrer without leave to amend"].)

- that Ford's sales representative orally reiterated this unqualified representation, stating that while Plaintiff's car could be broken into, it could not be started and driven away by a thief or by anyone else without use of the specially coded key. (AA 94-95, 118.)

On their face, these allegations identify promises that qualify as factual representations. Without equivocation, Ford flatly represented as a fact that the specially coded key must be used in order to start the engine of a vehicle equipped with the SecuriLock system, thus preventing a vehicle from being hot-wired.

2. The Element Of "Falsity" Was Adequately Pleaded.

The First Amended Complaint alleged, again with due specificity, that each of Ford's representations was false – that "[d]irectly contrary to the representations . . . Ford Vehicles equipped with the SecuriLock system, including the Ford Explorer leased by Plaintiff, can be started and driven away even though the specially coded driver's key is not used." (AA 95.)

Although it was not necessary, Emily's complaint even went further. It alleged facts demonstrating falsity: "That Defendants' written and oral representations are false is demonstrated by the manner in which Plaintiff's Ford Explorer was stolen. . . . [P]laintiff's Ford Explorer was stolen by means of punching out the ignition, hot wiring the vehicle, and driving it away – all without use of the specially coded key." (AA 95.)

3. The "Knowledge" Elements Of The Intentional And Negligent Misrepresentation Theories Were Adequately Pleaded.

The element of "knowledge of falsity" can be alleged generally, particularly where, as here, the defendant already has knowledge of the facts concerning the controversy. (E.g., *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at pp. 217-218.)

This element was properly pleaded here. Emily alleged that Ford did in fact know that its representations were false (AA 96) and that, if it did

not know, it should have known (AA 98). She further alleged that by reason of its knowledge and expertise regarding the manufacture, engineering and performance of Ford vehicles, Ford was in a unique position to know the limits of the SecuriLock system. (AA 96.)

Moreover, the record here affirmatively demonstrates – from Ford's own internal documents – that Ford actually knew or should have known its representations *were* false. Since the time the First Amended Complaint was filed, evidence gathered from Ford in discovery establishes that Ford knew its SecuriLock technology could be circumvented and its cars started without using the specially coded key. (E.g., AA 1178, 1202 [Ford admits in patent application that it was aware its pre-1998 SecuriLock technology could be circumvented and cars started and driven away without use of specially coded key], 1034-1039 [SecuriLock's creator Treharne admits that SecuriLock-equipped vehicles can be started and driven away without the specially coded key in two different ways], 1160 [Treharne stated at "cert review" meeting that SecuriLock system needed to be improved to stymie thieves who could bypass the technology], 618-622 [Ford employee's SecuriLock-equipped vehicle actually stolen by hot-wiring, theft is reported to management, and management explains the theft as resulting from the "limp away" mode], 1063-1064 [Ford reveals need for "Damage Control" through "PR and Advertising" in order to impact "probable customer perception" after airing of two network television programs showing how thieves were "defeating Ford's Hi-Tech security system"].)

There is simply no question that Emily can and did plead "scienter."

4. The "Intent To Induce Reliance" Element Was Pleaded Adequately.

To be actionable as either intentional fraud or negligent misrepresentation, Ford's misrepresentations "must have made with the intent to induce the recipient to alter his position to his injury or his risk." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864; *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices*, *supra*, 207 Cal.App.3d at p. 1285.) These

elements can be satisfied by general allegations where, as here, "'the facts lie more in the knowledge of the opposite party . . . .'" (*Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 217, quoting *Turner v. Milstein* (1951) 103 Cal.App.2d 651, 658.) Emily alleged Ford's requisite intent in so many words. (AA 97.) That's all that is required.

Here, Ford's sales brochures and sales representatives were touting the SecuriLock system as a foolproof means of preventing hot-wiring, while Ford knew this was false. It doesn't take a rocket scientist to understand that Ford's motive was to induce customers to believe that SecuriLock-equipped vehicles would reduce theft risk and thus be led to purchase such vehicles. Ford's own documents reveal it engaged in "damage control" when disclosures of the SecuriLock system's shortcomings diminished public perception of Ford products.

A defendant's intent to induce the plaintiff to alter his position "can be inferred from the fact that defendant knew the plaintiff would act in reliance upon the representation." (*Eddy v. Sharp*, *supra*, 199 Cal.App.3d at p. 864.) Furthermore, one who practices deceit with intent to defraud the public is deemed to have intended to defraud every member of that class who is actually misled by the deceit. (Civ. Code, § 1711; see also *Quirici v. Freeman* (1950) 98 Cal.App.2d 194, 201 [falsely inadequate label on paint can]; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111 [label on packaging and cover of instruction booklet on golfing device].)

Here, Emily properly alleged that Ford knowingly misrepresented the effectiveness of the SecuriLock system in order to sell more cars (AA 97) and that Ford knew that potential customers, including herself, would act in reliance on their representations that a SecuriLock-equipped vehicle could not be hot-wired.

Emily's allegations of Ford's intent to induce her reliance are more than sufficient to withstand demurrer.

5. The Element Of "Justifiable Reliance" Also Was Pleaded Adequately.

Emily pleaded that she actually and justifiably relied on Ford's representations regarding the ability of the SecuriLock system to prevent hot-wiring. She did this when she leased the Ford Explorer and again when she opted to forgo additional security protections, such as the "Club" or "LoJack." (AA 95-96.)

Whether her reliance on Ford's misrepresentations was reasonable and justifiable is an issue not properly raised on demurrer. (*Grey v. Don Miller & Associates., Inc.* (1984) 35 Cal.3d 498, 503 [reliance is a question of fact to be decided by a jury]; *Charpentier v. Los Angeles Rams Football Co., supra,* 75 Cal.App.4th at p. 313 [whether reliance on defendant's misrepresentations was reasonable "is up to the jury to resolve, not us"].)[7]

That a promised security feature would prompt justifiable reliance in this day and age is elementary. Unfortunately, crime – including car theft – is an everyday occurrence, especially in dense urban environments. Obviously, Ford deemed the features of the SecuriLock system sufficiently important to tout them in its sales brochures and orally at the point of sale; and to engage in "damage control" when the networks were disclosing the system's deficiency. Why wouldn't an urban consumer, such as Emily, think them important, too, as a means of reducing the very real risk of theft?

Emily adequately pleaded the "reliance" element of her claim.

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[7] Only if Ford's representations were so obviously unimportant that no reasonable person would rely on them could this conceivably become a pleading challenge. (*Charpentier, supra,* 75 Cal.App.4th at p. 313, citing Rest.2d Torts, § 538, Com. e] [a "'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it'"].) Here, that is not the case by any stretch of the imagination.

6. The "Damages" Element Was Pleaded Adequately.

Finally, damage is an essential element of the fraud cause of action (*Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at pp. at 219-220.) Here, Emily specifically pleaded she suffered damages, which included specifically alleged dollar amounts attached to impound fees, repair fees, rental car fees and lease payments made while her vehicle was missing. (AA 98.) She was not required to plead damages with any greater specificity than this.

7. The Reason Given By The Trial Court For Sustaining The Demurrers As To The Fraud Counts Is Untenable.

In light of Emily's meticulous, element-by-element pleading, how could the trial court possibly have concluded that the fraud claim fell short? Answer: Only by patently disregarding the law.

According to Judge Goodson, Ford's unqualified oral and written false representations were not sufficient to support liability because she believed they were mere "puffing." (RT F-2 to F-3 ["You got to plead with more particularity. (You) (c)an't say that it was a generalized brochure, which (Defendants) are indicating is a piece of basically puff salesmanship. You got to – in order to meet these various causes of action, you can't just rely on just a generalized statement. You got to plead with particularity"].)

Wrong.

Under the law, false representations in promotional materials can form the nexus of a solid fraud claim. If they couldn't, companies would be at liberty to lie at will and without consequence about the claimed benefits of their products.

Fortunately, the law wisely refutes the nonsensical proposition adopted by the trial court. Consider, for example, the following:

- *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388. There, a defendant argued that

promotional materials could not form the basis of a fraud claim.[8] (*Id.* at p. 401.) The Court of Appeal flatly disagreed:

> "The alleged false representations in the subject brochures were not statements of 'opinion' or mere 'puffing.' They were, in essence, representations that the DC-10 was a safe aircraft." (*Id.* at p. 424.)

- *Hauter v. Zogarts*, *supra*, 14 Cal.3d 104. The Supreme Court held that representations printed on a shipping carton formed a proper basis for a false misrepresentation claim.[9] (*Id.* at pp. 111-112 [promises of safety are not statements of opinion — they are "representations of fact"].)

In *Hauter*, the Supreme Court observed a "trend toward narrowing the scope of 'puffing' and expanding the liability that flows from broad statements of manufacturers as to the quality of their products." (*Id.* at p. 112.) *Hauter* construed the "unqualified statements" made by defendant "liberally in favor of injured consumers" and held that "the assertion 'Completely Safe Ball Will Not Hit Player' is a *factual* representation." (*Id.* at pp. 112-113 & fn. 7, emphasis added.)[10] Then, almost as if the

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[8] The brochures contained statements, among others, that "[t]he fuel tank will not rupture under crash load conditions"; that the landing gear "are designed for wipe-off without rupturing the wing fuel tank"; that "the support structure is designed to a higher strength than the gear to prevent fuel tank rupture due to an accidental landing gear overload"; and that the DC-10 "is designed and tested for crashworthiness." (*Continental*, *supra*, 216 Cal.App.3d at p. 400.)

[9] The shipping carton label and instruction booklet cover for a golf training machine urged players to "drive the ball with full power" and further stated: "Completely Safe Ball Will Not Hit Player." (*Hauter*, *supra*, 14 Cal.3d at p. 109.) Plaintiff sued when he was injured by a golf ball he had hit using defendant's machine. (*Ibid.*)

[10] In so concluding, the Supreme Court relied approvingly on *Lane v. C. A. Swanson & Sons* (1955) 130 Cal.App.2d 210, 214-215, which noted:

(continued...)

Supreme Court anticipated the instant case, *Hauter* declared: "[d]efendants' [actionable] statement parallels that of an automobile dealer who asserts that the windshield of a car is 'shatterproof . . . or that of a manufacturer who guarantees his product is 'safe' if used as directed." (*Id.* at p. 113, citations omitted.)

Numerous other cases so hold.[11]

Just as in these cases, Ford's unqualified representation that "unless your specially coded driver's key is used, the vehicle won't start" is not an opinion. It is not puffery; it doesn't claim Ford's product is better than some other product. It is a statement of *fact* regarding the performance capabilities of the SecuriLock system. Indeed, Ford's representations that a certain type of theft – hot-wiring – could not occur are factual representations directly analogous to the statements found actionable in *Continental*, such as that "[t]he fuel tank will not rupture under crash load conditions," and to the statement in *Hauter* that the product was "Completely Safe Ball Will Not Hit Player."

The promotional representations were actionable in each of the cited cases. They are also actionable here.

For the reasons stated above, Emily alleged each and every element of her intentional fraud and negligent misrepresentation claims. The trial

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[10] (...continued)
"The tendency of the modern cases is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods and to enlarge the responsibility of the seller to construe every affirmation by him to be a warranty when such construction is at all reasonable."

[11] See, e.g., *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 (statements in sales brochures as to seaworthiness of sailboat were affirmations of fact which could form basis of breach of express warranty claim); *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958 (statements in brochure about drill's capabilities were factual representations that properly formed the basis of breach of express warranty claim).

court prejudicially erred in sustaining Ford's demurrer and removing these causes of action from the lawsuit. Each cause of action must now be reinstated.

C. The First Amended Complaint Also Alleged Valid Causes Of Action For Breach Of Warranty.

The First Amended Complaint included two causes of action based on Ford's breach of warranty.

One was founded on the Magnuson-Moss Warranty Act (the "Act"), which provides a private right of action for the purchaser of a consumer product against a manufacturer or distributor who fails to comply with terms of a written warranty. (15 U.S.C. §2310, subd. (d)(1) ["a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief"].) The other, for breach of express warranty, was based on Commercial Code section 2313, which permits a consumer to sue for a seller's breach of a promise or affirmation related to the goods being sold or for any description of a product.[12]

The elements of these two causes of action are essentially congruent. Emily has stated viable breach of warranty claims under each statute.

1. Emily Alleged That Ford Furnished Her With Written Warranties.

Emily specifically alleged that Ford provided her with "express written representations and affirmations that a car equipped with the

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[12] That statute provides, as pertinent: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description . . . ." (Comm. Code, § 2313.)

'SecuriLock' system could not be started or driven away without the specially coded key." (AA 104.) She pointed out exactly when and how these representations were made – in Ford's sales brochure and owner's manual and by Ford's salesman at the point of sale.

The written representations in the sales brochure and in the owners' manual are "written warranties" or "implied warranties," or both, under the Act; and both Ford's written and its oral representations are "express warranties" under the Commercial Code. They are "affirmations of fact" and "promises" relating to the Explorer, as well as a "description" of the Explorer's security attributes. (See, e.g., *Fundin v. Chicago Pneumatic Tool Co.*, *supra*, 152 Cal.App.3d at pp. 957-958 [statements made by a manufacturer or retailer in an advertising brochure which is disseminated to the consuming public in order to induce sales can create express warranties; held, statements in brochure about drill's capabilities were factual representations that properly formed the basis of breach of express warranty claim]; *Hauter, supra*, 14 Cal.3d at p. 115, fn. 10 ["defendants' statement (on the packaging of the Golf Gizmo: 'Completely Safe Ball Will Not Hit Player') is one of fact and is subject to construction as an express warranty"]; *Lane v. Swanson & Sons*, *supra*, 130 Cal.App.2d at p. 215 [representations in advertisements and manufacturers' brochures served as the bases of express warranties]; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60 [manufacturer's brochure]; *Keith v. Buchanan*, *supra*, 173 Cal.App.3d at p. 22 [statements in sales brochures formed basis of express warranty claim].)[13]

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[13] Even if a court somehow were to construe Ford's categorical factual statements regarding the SecuriLock system as statements of opinion, such statements could *still* form the basis of an action for breach of express warranty. (*Hauter, supra,* 14 Cal.3d at p. 115, fn.10 ["(E)ven statements of opinion can become warranties under the code if they become part of the basis of the bargain" (citations omitted)].)

Here, Emily's First Amended Complaint quotes the representations actually made by Ford in its sales brochures and owners' manuals, as well as that made by Walker-Buerge's sales representative, Ron Kramer. (AA 105.) On demurrer, the trial court was required to accept as true Emily's allegations that Ford had provided her with written warranties that the SecuriLock system would prevent hot-wiring theft. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 459 [court must assume the truth of all facts properly pleaded].) Its failure to do so is reversible error.

2. Emily Alleged Facts Showing That Ford Breached Its Written Warranties.

Emily also pleaded the "breach" element of her warranty claims. She alleged: "The 'SecuriLock" security system did not perform as Defendants represented and affirmed it would perform"; and "the 'SecuriLock' system [failed] to perform as advertised and promised." (AA 104-105 [Act claim]; see AA 105 [Commercial Code claim: "Defendants breached these express warranties by leasing to Plaintiff a Ford Explorer that did not perform as Defendants warranted and represented it would perform. Contrary to Defendants' representations, Plaintiff's Ford Explorer was started and driven away by a thief without the use of the specially coded key"].) These allegations comply precisely with statutory criteria.

3. Emily Properly Pleaded Her Damages.

As with her fraud causes of action, Emily properly pleaded her damages. She alleged specific monetary damages suffered "[a]s a result of Defendant's breach of its written warranties. . . ." (AA 104 [Act claim], AA 106 [Commercial Code claim].)

4. Emily Properly Spelled Out Her Entitlement To Injunctive Relief And Attorneys' Fees And Costs Under The Act.

The Act includes a provision for obtaining injunctive relief and attorneys' fees. Emily properly pleaded her entitlement to these remedies.

(AA 105.) Emily alleged that she is standing up for the consuming public and seeks injunctive relief to stop Ford (which, at least as of the time the complaint was filed, continued to perpetuate the same lies about SecuriLock in its current brochures) from knowingly making false statements about important security features in order to fool the public. (AA 105, 107-108.)

Emily pleaded each and all of the elements of a cause of action for breach of warranty. The trial court prejudicially erred – yet again – in sustaining Ford's demurrer and dismissing Emily's causes of action for Ford's breach of express oral and written warranties.

For all the stated reasons, the trial court erred prejudicially in dismissing Emily's fraud and breach of warranty causes of action. Those causes of action must be reinstated and the case permitted to go forward.

II.

SUMMARY JUDGMENT WAS IMPROPER AND MUST BE REVERSED BECAUSE THERE ARE DISPUTED ISSUES OF MATERIAL FACT THAT ENTITLE EMILY TO A TRIAL ON THE MERITS.

Three causes of action remained after the groundless dismissal of the others. The remaining claims sought relief on theories of false advertising/unfair trade practices (Bus. & Prof. Code, § 17200, et seq.), deceptive trade practices (Civ. Code, § 1750, et seq.) and negligence. Each involves the same core element, namely, that Ford misrepresented SecuriLock's capabilities because cars equipped with that system *can* be started and driven away without using the specially coded key.

The trial court granted summary judgment because it concluded "there is inadequate evidence to establish a triable issue of fact as to whether plaintiff's vehicle or any other Ford vehicle including 1996, 1997 and 1998 models equipped with the SecuriLock system has ever been stolen by starting and driving the vehicle without use of a specially coded key." (AA 1422-1423.)

The trial court was wrong. When viewed in light of the governing standard of review, the record simply doesn't support this determination. In fact, the record squarely contradicts it.

What the record reveals is that on the evening of May 26, 1998, Emily parked her SecuriLock-equipped Ford Explorer in front of her home; she removed the key, locked the car, and retired for the evening; the next morning, the car was gone; and three weeks later, it turned up five blocks away with the ignition punched out. From these undisputed facts *alone*, a jury could infer that the car had been hot-wired, exactly the event that Ford promised both Emily and the consuming public was impossible. Emily should not have had to produce anything more to survive Ford's summary judgment motion.

But she did produce more. Much more.

In addition to the facts just recited, Emily produced evidence that Ford knew its SecuriLock system was flawed. (E.g., AA 618, 621, 798, 1019, 1033-1034.) In particular, she produced evidence that SecuriLock's creator had admitted SecuriLock was not foolproof and that, in fact, there were two known methods (the "limp away" and the "bypass" modes) by which SecuriLock-equipped vehicles could be started and driven away without use of the specially coded key. (AA 1034-1039; see also AA 618-622.) She produced evidence of a patent application for a SecuriLock "fix" in which Ford admitted the SecuriLock system was subject to defeat. The application conceded: "One drawback of this patent [the existing patent for SecuriLock] is that the vehicle may be moved a short distance before the engine is disabled by subsequent failure to detect a valid key code. It may also be possible to sustain operation with the engine in a start mode by electronically tampering, allowing a thief to drive a vehicle away (albeit with poor engine performance)." (AA 1178, 1202.) She produced evidence that one of Ford's own employees's cars had been hot-wired and driven from the company parking lot and that For explained the theft as likely having been accomplished by the "limp away" mode. (AA 618.) She

produced evidence of Ford-produced graphs showing how "damage control" through "PR and advertising" had reversed a downturn in consumer perception of Ford vehicle security after the airing of "Good Morning America" and the "Today Show" segments exposed how thieves were able to defeat Ford's SecuriLock system. Finally, Emily showed that her expert actually was able – in just two minutes – to start a SecuriLock-equipped car without a specially coded key *and drive it away*. (AA 1337-1357, 1449 [Videotape Exhibit].)

Given the evidence, summary judgment was not just improper. It was indefensible. It enables Ford to get away with having duped millions of consumers who purchased and are continuing to purchase SecuriLock-equipped vehicles that don't offer the security that Ford promises.

A. Standard of Review.

Review of summary judgment is *de novo*. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) The appellate court independently reviews the record and, "[i]n practical effect, . . . assume[s] the role of a trial court and appl[ies] the same rules and standards that govern a trial court's determination of a motion for summary judgment." (*DiStefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258; *Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648 [same].)

The public policy goal is that cases should be tried on the merits unless there is absolutely no factual issue to be tried. (E.g., *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392.) "Due to the drastic nature of summary judgment, any doubts about the propriety of granting the motion must be resolved in favor of the party opposing the motion." (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355 [the moving party's evidence is construed strictly while the resisting party's is construed liberally]; *Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 388 ["We resolve all doubts as to whether any material, triable issues exist in favor of the party opposing summary judgment"].)

Thus, "[a]n appellate court will reverse a summary judgment if any kind of a case is shown." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 43; see also *Bennet v. Shahhal, supra,* 75 Cal.App.4th at p. 388 ["Summary judgment is proper *only* where there is no triable issue of material fact" (emphasis added)].)

Does Emily have a case here? Of course she does. It's not even a close question. She therefore is entitled to take each of her causes of action to trial. Once again, the judgment must be reversed.

B. Emily Is Entitled To Try Her Claim For False Advertising/Unfair Trade Practices (Bus. & Prof. Code, § 17200, et seq.), Because Her Evidence Of Ford's False Advertising Is More Than Sufficient To Create A Triable Issue Of Fact.

Emily's claim under Business & Professions Code section 17200, et seq., is one for false advertising. Ford's summary judgment motion never even addressed – let alone negated – that central theory. Both the motion and the trial court's decision were predicated only on the theory that Emily could not prove how *her* car was stolen. However, the issue is immaterial to Emily's false advertising claim.

Under the statute, it doesn't matter how *Emily's* Explorer was stolen. Rather, the controlling question is whether there was evidence that Ford engaged in false advertising *to the public* about the attributes of its SecuriLock system. There was such evidence here. It came from Ford's own files. It demonstrated, in Ford's own words, that Ford admitted its SecuriLock system was subject to defeat by thieves. In the face of evidence that pre-1998 vehicles equipped with the SecuriLock system could be started and driven away without the use of the specially coded key, the trial court could not properly grant Ford summary judgment.

Business & Professions Code section 17200 is a representative statute that permits any member of the public to serve as a private attorney general on behalf of the general public. (*Stop Youth Addiction, Inc. v.*

Lucky Stores, Inc. (1998) 17 Cal.4th 553 [nonprofit corporation had standing to pursue claim against grocery store for selling cigarettes to minors].)

Emily has met the statutory criteria. Her claim is based on allegations that Ford misled and deceived the *general public* in written and oral representations made regarding the SecuriLock system. (AA 99-101.) She introduced proof that that is so.

Under the law, Emily could defeat summary judgment with evidence showing that, irrespective of what happened with her own car, there were triable issues of fact as to the falsity of Ford's representations that the SecuriLock system will prevent cars equipped with such devices from starting without the specially coded key. There was ample evidence of Ford's false advertising here:

- Ford circulated sales brochures that promised "Unless your specially coded driver's key is used, the vehicle won't start." (AA 94, 95.)
- Ford's own expert admitted that pre-1998 SecuriLock-equipped vehicles *could be* hot-wired. (AA 620-622.)
- Internal Ford documents and Ford's patent application corroborate this and reveal that Ford *knew* its pre-1998 vehicles could be started without using the specially coded key. (AA 618-622, 1160, 1178, 1202.)
- Emily's expert declared the SecuriLock system could be circumvented easily and quickly, allowing thieves to start the engine and drive the car away without using the specially coded key. (AA 547-550.)
- A SecuriLock-equipped Ford owned by a Ford employee was stolen in exactly this manner. (AA 618-622, 1160.)
- Emily's own car was stolen that way.
- Ford's internal documents referred to television exposés about "[h]ow theives [*sic*] are defeating the Ford Hi-tech Security

system" and to "Damage Control" through "PR and Advertising" in order to alter "probable customer perception."

If ever there was a case of false advertising, this is it. Emily presented ample evidence that, at a minimum, a triable issue of fact existed as to the falsity of Ford's representations that SecuriLock-equipped vehicles for model years 1996, 1997 and 1998 "will not start without your specially coded key." (AA 624.) If any summary judgment were warranted here, it would be in Emily's favor.

The trial court erred egregiously when it found that "there is inadequate evidence to establish a triable issue of fact as to whether plaintiff's vehicle or any other Ford vehicle including 1996, 1997 and 1998 models equipped with the SecuriLock security system has ever been stolen by starting and driving the vehicle without use of a specially coded key." (AA 1422-1423.) The judgment as to the false advertising cause of action (Bus. & Prof. Code, § 17200) must be reversed.

C. Emily Is Entitled To Try Her Causes Of Action For Deceptive Trade Practices And Negligence, Because Her Evidence Is More Than Sufficient To Present Triable Issues Of Fact As To Each Of Those Claims.

The two remaining causes of action – for deceptive trade practices (Civ. Code, § 1750, et seq.) and negligence – focus more directly on the theft of Emily's own Ford Explorer. Both share a core theory: Ford touted its SecuriLock system as a guarantee against hot-wiring theft; Emily relied on Ford's representations in choosing to lease a Ford Explorer and to forgo installing other security devices on her Explorer; Ford's representations were false; and Emily's Explorer was stolen via hot-wiring.

It doesn't take much to create a triable issue with respect to this controversy. Even the bare bones of Emily's evidence should have sufficed to secure her right to a trial. In particular, Emily provided the following:

- Evidence that Ford represented in writing in its sales brochures and owner's manuals, and orally at the point of

sale, that with the SecuriLock system, "Unless your specially coded driver's key is used, the vehicle won't start." (AA 94-95.)

- Evidence that although she had the specially coded keys to her car in her possession, her locked car was stolen and driven away without use of the key. (AA 92.)
- Photographs showing that the ignition of her SecuriLock-equipped Ford Explorer was removed during the theft, consistent with hot-wiring. (AA 92, 111-112.)
- Evidence that the computer coding in her car's ignition had to be repaired after the theft. (AA 365.)

This evidence suffices in itself to create a triable issue as to whether Emily was damaged by Ford's deceptive trade practices or negligence. Moreover, even without managing to extract important discovery from Ford,[14] Emily presented additional evidence that supports not only the inference that her Explorer was started and driven away without the specially coded key, but also that Ford knew that SecuriLock did not work as promised.

First, Emily produced evidence that SecuriLock's creator, a Ford engineer, acknowledged that SecuriLock-equipped vehicles can be started and driven away without the specially coded key by at least two methods. One of these methods is by electronic bypass; the other is the "limp away mode," where the car is started by hot-wiring and then "limps away" for a short distance before the motor dies out. (E.g., AA 1178, 1202.) This latter method is strikingly consistent with what happened to Emily's Explorer, i.e., its hot-wiring and subsequent discovery just five blocks from where it was stolen. (AA 1034-1039; see also AA 618-622.)

Second, Emily produced further evidence confirming Ford's knowledge that it was misrepresenting its SecuriLock system. Specifically,

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[14] We address some of Ford's discovery abuses in Section III, *infra*.

she produced a patent application demonstrating that Ford knew that its pre-1998 SecuriLock technology could be circumvented and its cars started and driven without the use of the specially coded key. (AA 1178, 1202.)[15] The patent application specifically admits that the vehicle can be driven away by a thief, "albeit with poor engine performance."

Third, Emily produced evidence of a "certification review" meeting at which Ford engineer and SecuriLock creator Treharne admitted that the SecuriLock system needed to be improved to prevent circumvention by thieves who could start and drive away cars in spite of the technology. (AA 620-621, 1160.)

Fourth, she produced evidence that the SecuriLock-equipped Ford car of one of Ford's own employees had been hot-wired and driven from the company parking lot, that the employee had complained about it to the very people responsible for creating the SecuriLock system, including Ford's "expert" here, and that they explained the theft as attributable to the "limp away" method, a mode Ford knew was a means of circumventing the SecuriLock system. (AA 618-622, 1160).

Fifth, she produced two 1996 graphs created by David Tengler (the Ford employee who inspected co-employee Tom Green's SecuriLock-equipped Ford Mustang after it was stolen to determine the manner of theft). (See AA 618-622, 1116-1117.) One revealed Ford's projection that thieves would learn to circumvent the SecuriLock system (AA 1063); the

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[15] The patent application states: "U.S. Pat. No. 5,539,260 shows a key-mounted transponder storing a key code that is transmitted to a theft control module via an antenna. The theft control module allows the vehicle to attempt to start before checking for a valid key code in the transponder to eliminate the portion of the delay resulting from the interrogation of the transponder. *One drawback of this patent is that the vehicle may be moved a short distance before the engine is disabled by subsequent failure to detect a valid key code. It may also be possible to sustain operation with the engine in a start mode by electronical [sic] tampering, allowing a thief to drive a vehicle away (albeit with poor engine performance).* (AA 1178, 1202, emphasis added.)

other referred to public relations and advertising "damage control" to reverse a precipitous drop in consumer perception of vehicle security after "Good Morning America" and the "Today" show each aired a piece on "How theives [*sic*] are defeating the Ford Hi-tech Security System" (AA 1064).

This evidence is completely consistent with the exact manner in which Emily's car was stolen: theft by hot-wiring, coupled with the car being driven in "limp away" mode or with "poor engine performance." The ignition had been punched out and the car had been moved five blocks away, without use of the specially coded key. Moreover, the battery trim cap located under the hood had to be replaced after the theft, demonstrating that the thief had lifted the hood of the car, creating a further reasonable inference that the thief electrically bypassed the SecuriLock system. (AA 92, 111-112, 546-553, 628.)[16]

Furthermore, Emily's expert actually started a SecuriLock-equipped 1998 Ford Explorer without using the specially coded key. (AA 1337-1357, 1449 [Videotape Exhibit].) He was able to bypass the system in just two minutes. He was able to drive the car away. And it's all on videotape. (See AA 1449 [Videotape Exhibit].)

No case here? It's an outrage even to suggest it.

To put it mildly, the evidence creates a "reasonable inference" that the thief started the car without using the special key, and drove it away.[17] But even if there were competing inferences to be drawn from the facts, Emily's case still should have survived summary judgment. (Code Civ. Proc., § 437c; *Bennett v. Shahhal*, *supra*, 75 Cal.App.4th at p. 388

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[16] As Emily's expert observed, "If the theft was accomplished by pushing or towing, as [Defendants' expert] has concluded, there would have been no reason for the thief to have gone under the hood." (AA 550-551.)

[17] Emily actually presented even more evidence supporting her claim, but the trial court improperly struck her expert's declaration. (See Section III-D, *infra*.)

["Summary judgment is proper *only* where there is no triable issue of material fact" (emphasis added)]; *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562 ["All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment"].)

Because the evidence confirms the existence of triable issues of material fact as to each of Emily's causes of action, the trial court erred prejudicially in awarding summary judgment to Ford. The judgment therefore must be reversed and the case permitted to proceed to trial.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING EMILY'S MOTIONS TO REOPEN DISCOVERY AND FOR RECONSIDERATION IN LIGHT OF NEWLY-DISCOVERED EVIDENCE, AND IN STRIKING THE DECLARATION OF EMILY'S EXPERT.

Summary judgment also must be reversed because the trial court abused its discretion in denying Emily's motions to reopen discovery and for reconsideration in light of evidence newly developed in response to Ford's last-minute disclosure of a purported "fix" to its SecuriLock system, and in striking the declaration of Emily's auto theft expert.[18]

A. The Facts.

Ford systematically hamstrung Emily's preparation of her case by engaging in improper discovery tactics with regard to both document production and deposition scheduling. Among its more significant abuses, Ford failed until the last minute to disclose key facts about its knowledge of

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[18] If this Court agrees with the arguments advanced by Emily in Sections I and II above, it need not address the issues advanced here in Section III.

problems in the SecuriLock system under circumstances where Ford was obliged to make such disclosures much earlier in its responses to discovery; and, concurrent with its eleventh-hour disclosure, Ford shifted its theory of defense.

Here's what happened:

In August 1999, Emily propounded document requests that called for, among other things, *all* documents relating to: the development and/or testing of the SecuriLock system (AA 1201, 1209); advertising and/or any public relations campaign relating to the SecuriLock system (*ibid.*); the design of the SecuriLock system (*ibid.*); press releases, owner's manuals, shop manuals or other technical manuals, or information posted on the internet relating to the SecuriLock system (AA 1201, 1210); and Ford's decision to install the SecuriLock system as original equipment on Ford's vehicles (AA 1201, 1211).

After a delay of almost seven months, Ford finally produced about 1,700 documents on March 7, 2000. In so doing, it purported to have produced *all* documents germane to Emily's document requests. (AA 1189, 1201.) Nothing in the documents produced at that time expressly disclosed that Ford privately knew and believed that a thief could circumvent the SecuriLock system in pre-1998 vehicles. Nor did Ford then disclose any document revealing its purported knowledge or belief that any shortcomings in SecuriLock had been fixed prior to the 1998 model year. (AA 1190, 1193-1194, 1201-1202.)

Before September 2000, Emily was led to believe the SecuriLock technology present in her 1998 Explorer was identical to that installed in all 1995-1997 model vehicles. Only in its September 2000 reply papers in support of its motion for summary judgment, did Ford claim – *for the first time* – that the configuration of the SecuriLock system that permitted SecuriLock-equipped vehicles to be started in a "limp away" or electronic bypass mode existed but had been fixed prior to 1998. (AA 800-801.)

Moreover, it was not until September 29, 2000 – months after Ford's discovery responses were due – that Ford finally produced internal documents – veritable smoking guns – showing (a) that it had known since at least 1996 that its SecuriLock system didn't work and needed a "fix," (b) that an alleged "fix" to eliminate the possibility of hot-wiring thefts of SecuriLock-equipped vehicles actually had been undertaken, and (c) that the "fix" purportedly had been installed on 1998 Explorers such as Emily's. (AA 1178, 1202.) These revelations came more than a year after Emily propounded her original discovery requests asking Ford to produce *all* documents relating to the SecuriLock system, months after the initial document production took place, and, to make matters worse, several days after the discovery cut-off date. (AA 1192, 1201-1202, 1209-1211.)

In response to Ford's late revelations, Emily promptly moved to reopen discovery so that she could pursue the facts underlying the newly-divulged theory and evidence. She sought to garner information and documents about the alleged "fix" of the SecuriLock system, including (1) Treharne's newly-disclosed patent application, (2) Ford's tests of the alleged "fix," (3) the certification review meeting at which Treharne allegedly urged Ford to approve a change in the SecuriLock system to protect against "limp away," and (4) the implementation of the "fix" on the assembly line. (AA 1183-1200.)

The trial court refused to grant a continuance or to reopen discovery. Instead, on October 10, 2000, it awarded Ford summary judgment.

B. The Trial Court Abused Its Discretion In Refusing To Grant Emily's Timely Request To Reopen Discovery.

The trial court abused its discretion when it refused to reopen discovery pursuant to the motion Emily timely filed following Ford's sandbagging tactics – its last-minute disclosures and significant change in defense theory.

When Ford produced 1,700 documents back on March 7, 2000, purporting to have produced *all* documents responsive to Emily's discovery

requests, Emily was entitled to rely on the representation that all documents really had been produced and to prepare her case accordingly. (AA 1201.) The 70+ new documents that Ford "produced" in September 2000 were responsive to Emily's initial discovery requests, and thus should have been included in the March 2000 production.

These previously-hidden documents effectively changed Ford's theory of non-liability. Prior to its belated disclosure, Ford contended it was not liable because Emily's car could not have been stolen by hot-wiring, because no SecuriLock-equipped vehicle can be started without the specially coded key; Ford speculated that Emily's vehicle must have been towed or pushed. (AA 790.) However, in September 2000 Ford changed its theory, admitting *for the first time* that there *had* been problems with the SecuriLock system installed in pre-1998 vehicles, but these were eliminated by the time Ford manufactured Emily's 1998 Explorer.

Emily was entitled to reopen discovery to explore this new theory as well as the questions raised by the late document production. (See Code Civ. Proc., § 2024, subd. (e) ["On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set"]; see also *Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 599 ["Unavailability of a witness, or the absence of evidence, may be proper grounds for a continuance]; Code Civ. Proc., § 595.4 [motion to postpone trial on ground that additional evidence must be obtained may be granted upon showing that the evidence to be obtained is material and that due diligence has been used to procure it].)

Emily's ability to prove her case and to respond meaningfully to Ford's belated shift in defense theory embodied in its summary judgment motion was undermined by Ford's last-minute production of documents that were required to be produced months earlier, and by Ford's concomitant last-minute concoction of a defense theory as to which Emily had received no notice and no opportunity to conduct discovery.

Even if the trial court believed Emily's evidence in opposition to summary judgment was insufficient – a conclusion insupportable on this record – it still should have reopened discovery where Ford clearly had both failed to hand over material evidence and shifted its defense theory at the last minute. (See Code Civ. Proc., § 437c, subd. (h) [if opposing party can show by declaration that controverted evidence "may" exist, but cannot for reasons stated, then be presented, the court "shall" grant a continuance or deny the motion]; *Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 555-556 [error to grant summary judgment under such circumstances]; *People v. $4,503 United States Currency* (1996) 49 Cal.App.4th 1743, 1749 [summary judgment properly denied where moving party refused to comply with discovery requests and failed to appear at depositions]; see also AA 612-617 [describing Defendants' stonewalling and stating that controverted evidence may exist, but could not then be presented].)

The trial court wrongly allowed Ford to profit from its deception and discovery gamesmanship. Even more startling, it made the ruling in the face of new disclosures by Ford that expressly confirmed that the SecuriLock system was flawed prior to 1998. The trial court improperly acted as a jury, choosing to believe Ford's tale that prior problems were "fixed," when in fact they were not, as Emily's videotape later established.

Here, discovery was incomplete by reason of Ford's sandbag tactics and through no fault of Emily's. The trial court unquestionably abused its discretion in denying her motion to reopen discovery to correct Ford's abuses.

Granting Ford summary judgment under the circumstances was an abuse of discretion resulting in a miscarriage of justice. (See *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 187 ["we conclude that (defendant) did not make a showing that (plaintiff's) case 'cannot be established' sufficient to shift the burden to the (plaintiff) in the summary judgment proceedings. Any arguable inability the individual plaintiffs might have experienced . . . to provide direct evidence . . . would have been

explicable here . . . inasmuch as the plaintiffs almost certainly would not have (had access to the relevant evidence)"].)

C. The Trial Court Abused Its Discretion When It Denied Emily's Motion For Reconsideration.

On October 10, 2000, it took Emily's auto theft expert Robert Painter two minutes to start a SecuriLock-equipped 1998 Ford Explorer by electrically bypassing the SecuriLock system with a small piece of wire. (AA 1337-1357, 1449 [Videotape Exhibit].) He did this in order to refute Ford's last-minute September 2000 assertion that the failings in the SecuriLock system had been eliminated before the 1998 model year, and therefore were not present in Emily's Explorer.[19]

In short, Ford's last-minute claim of a "fix," on which the order granting summary judgment was premised, was a lie.

Painter's videotaped test vividly demonstrates, directly contrary to Ford's belated assertions, that a thief can quickly hot-wire a SecuriLock-equipped car, including a 1998 model manufactured after Ford instituted the supposed "fix" to correct what it belatedly admitted was a problem with pre-1998 models.

Painter's test conclusively refuted the centerpiece of Ford's new defense theory that it first articulated after the discovery cut-off had passed. On the basis of this test, Emily moved for reconsideration of the order granting Ford summary judgment. The trial court prejudicially erred yet again when it denied that motion. (AA 1421.)

Code of Civil Procedure section 1008, subdivision (a), provides that a party may seek reconsideration of an order based on "new or different facts, circumstances or law." The moving party must present "a satisfactory explanation for failing to provide the evidence earlier." (*Garcia v. Hejmadi*

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[19] Painter couldn't perform the test on Emily's own leased Explorer, because Emily's two-year lease expired in November 1999 and Emily relinquished the vehicle at that time. (RT E-2; see AA 1354 [counsel was searching for a vehicle to test with a VIN close to Emily's].)

(1997) 58 Cal.App.4th 674, 690.) "A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

A trial court abuses its discretion in denying a motion for reconsideration where there is a satisfactory explanation for failing to produce evidence earlier. Moreover, even if the moving party does *not* provide justification for failing to earlier present evidence, it is nonetheless an abuse of discretion for a trial court to deny a motion for reconsideration where the practical effect of such denial is to dismiss a potentially meritorious cause of action. (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343.)

For instance, in *Mink*, the trial court granted the defendant summary judgment on the ground the action was time-barred. After judgment was entered, however, plaintiff produced evidence showing there had been an intervening weekend and court holiday which affected the calculation of time. The Court of Appeal overturned the trial court's order denying plaintiff's motion for reconsideration. Significantly, the Court stated that even if it had not found plaintiffs' excuse acceptable, reconsideration still should have been granted because the record showed that plaintiff had a potentially meritorious cause of action:

> [A]s a matter of law the new facts presented were sufficient to require the trial court to reconsider its ruling on the summary adjudication motion and ultimately to revoke its prior order. Regardless of the adequacy of counsel's excuse for not discovering the true facts earlier, the effect of the trial court's ruling was to dismiss [plaintiffs'] potentially meritorious causes of action as barred by the statute of limitations even though the statute had not run. Such a ruling does nothing to advance the interests of justice.

(*Mink v. Superior Court*, *supra*, 2 Cal.App.4th at p. 1343.)

So, too, here. The practical effect of denying a motion for reconsideration is to dismiss a potentially meritorious cause of action. Here, the videotape demonstrated that the defects Ford admitted had existed

in the SecuriLock system were not "fixed" as Ford claimed, but rather, persisted into the 1998 model year.

The need to conduct Painter's experiment wasn't apparent until after the close of discovery because, as a result of Ford's stonewalling discovery tactics, Emily didn't know that she would need to refute any claim that the problem with SecuriLock was "fixed" before her car was manufactured.

Until that belated shift in defense, Emily justifiably relied on Ford's March 7, 2000, document production as being a complete and full production of "all" documents in response to her comprehensive document requests. The documents Ford initially produced confirmed the existence of the electrical bypass and limp-away failure modes of the SecuriLock system and revealed that a SecuriLock-equipped vehicle of one of its own employees had been stolen via the limp-away method. These documents supported Emily's theory that the SecuriLock system in her 1998 Explorer was defective (AA 1352-1353), and she didn't need to try to defeat the SecuriLock system in another 1998 Explorer in order to prove her case.

In short, until September 2000, Emily had no occasion to refute a "fix" theory that until then had never been asserted or disclosed in documentation previously produced by Ford. (See *Hollister v. Benzl* (1999) 71 Cal.App.4th 582, 585 [reconsideration of order compelling arbitration appropriate where party did not produce key documents until after plaintiff's motion for reconsideration had been heard].)

From September 2000 onward, Emily diligently sought to arrange for her expert to perform his hot-wiring experiment. She expeditiously sought to obtain another 1998 Explorer for testing by her expert, as she no longer had hers. (AA 1353-1355; see footnote 19, *supra.*) She promptly attempted to schedule such a test with her expert, who was based in Milwaukee and who could not immediately perform the experiment. (AA 1354.) She even filed a motion to reopen discovery to pursue Ford's late-minted theory of non-liability. The trial court improperly granted Ford's

motion for summary judgment (thereby mooting the motion to reopen discovery) and denied Emily's motion for reconsideration.

Because the need for Painter's test and the timing of Emily's ability to present it are attributable to Ford's discovery abuses, not to Emily's lack of diligence, the trial court abused its discretion when it refused to grant Emily's motion for reconsideration. In so doing, the court threw out a meritorious case that, on its face, demonstrated that Ford has been lying to the public for years about the claimed merits of its SecuriLock system.

D. The Trial Court Erred Prejudicially In Striking The Declaration Of Emily's Expert.

In addition to all the errors already described, the trial court improperly struck the declaration of Emily's auto theft expert, Robert Painter. Thus, Emily actually presented more evidence supporting her claims than the trial court elected to entertain.

In striking the expert declaration, the trial court stated, "while plaintiff's expert, [Robert] Painter, clearly has expertise in the area of auto thefts in general, there is insufficient foundation showing training, experience, education or knowledge in the operation of the electrical passive anti-theft system to qualify Painter as an expert on the SecuriLock system or the ability to disable or circumvent that system." (AA 1422-1423.) The court's reasoning makes no sense.

The question of Painter's knowledge of the particularities of the SecuriLock system goes to the credibility of his testimony, not to its relevance. Ruling on motions for summary judgment, courts don't assess issues of credibility; they only determine whether there is a dispute about relevant facts. (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 822 ["A court generally cannot resolve questions about a declarant's credibility in a summary judgment proceeding"]; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485, fn.2 ["the trial court is not to consider the credibility of witnesses"].)

This case involves theft of a vehicle. Painter is an expert in that area and he testified he read publicly-available manuals on the workings of the SecuriLock system. Although Painter's expertise in auto theft is quite a bit more relevant than an understanding of the SecuriLock security system, he demonstrated he had expert knowledge in both areas.

The central issue in this case is *whether* the car was hot-wired, not *how*, and Painter was qualified to testify on that issue.

CONCLUSION

SecuriLock-equipped vehicles like Emily's Explorer don't work as Ford promised. Contrary to Ford's oral and written representations, such vehicles can be started – and, thus, stolen – without the special key.

The evidence shows that, for years, Ford has been lying about the capabilities of its security technology. These lies have led millions of consumers, including Emily, to believe their SecuriLock systems would prevent hot-wiring theft. The lies should stop now. Emily's meritorious claims must be permitted to go forward.

For all the reasons stated, this Court should reverse the judgment, reinstate the causes of action eliminated on demurrer, and permit this lawsuit to advance to trial. The interests of justice and those of all consumers demand this result.

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Respectfully submitted,

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