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

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INTRODUCTION

Defendants, Ford Motor Company and Walker Buerge, Inc. (jointly, "Ford"), proclaim that their unequivocal factual representations—"Vehicle will not start without your specially coded key"—aren't actionable if untrue.

Nonsense.

As the California Supreme Court recently held, when a corporation makes "factual representations about its own products . . . , it must speak truthfully." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 946.)

Ford did not speak truthfully to plaintiff Emily Greines ("Emily") and the consuming public. It represented that the Ford Explorer could not be started without a specially-coded key. This was a deliberate falsehood.

In her Opening Brief, Emily demonstrated that triable issues of fact abound and that all her causes of action were pleaded properly. Ford's response? It attempts to try this case on motion. It asks this Court to act as a jury—to accept its version of the facts and reject Emily's.

This is impermissible. Ford ignores the most elementary of procedural rules and the governing standards of review. It is *Emily's* allegations that must be accepted as true on demurrer; it is *Emily's* evidence must be accepted as true for purposes of summary judgment.

A court reviewing an order sustaining a demurrer must answer only one question: Did the plaintiff's complaint a state cause of action? Here, Emily's complaint did. As demonstrated in our Opening Brief, Emily properly pleaded facts supportive of each element of every cause of action to which Ford's demurrer was sustained. Ford does not—and cannot—show otherwise. The trial court had no legal basis for sustaining demurrers to those claims without leave to amend. Emily's fraud and breach of warranty causes of action must be reinstated.

The same is true as to the causes of action on which summary judgment was granted. Once again, Ford's arguments manifest a total disregard for the rules. Rather than addressing Emily's evidence in its most favorable light and rather than confronting the inferences favorable to Emily, Ford lays out the facts solely from its own perspective, arguing that the self-serving statements of its own employees must be accepted, without being subject to test by a jury. Not so. Not even close.

Ford ignores the cardinal rule that the evidence must be viewed in the light most favorable to *the non-moving party*—Emily. Viewed from Emily's perspective, there is abundant evidence that her car was hot-wired in contravention of Ford's flat-out factual representations that a SecuriLock-equipped car "will not start without your specially coded key." Indeed, Emily's car was started and stolen without the use of its key and was retrieved five blocks away with its ignition "punched out." As

numerous cases hold, *these facts alone* create an inference that her car was hot-wired. (See cases cited at p. 33, *infra*)

But we don't need just inferences here. In this case, there are smoking guns. The falsity of Ford's representations is established by the admissions of Ford's own employees. Among other things, Ford's employees stated:

- "Just thought I'd let everyone know that PATS [*SecuriLock*] *is not really an effective theft deterrent*. . . My Mustang was stolen yesterday morning. . . . Seems whoever stole it simply drove past the guard . . . I guess it was running OK." (AA 618, emphasis added [admission by Ford employee Tom Greene].)
- "The knowledge and cunning of thieves is absolutely amazing. *We need the upgrades to the [SecuriLock] system to close the loopholes*. When I said the Mustang was HIGH RISK, I was not kidding!!!!!" (AA 620, emphasis added [admission by Ford's engineer and SecuriLock creator, David Treharne].)
- "The thieves could have used the 'Limp Away' mode I was describing. . . . *Th[is] screwdriver method works*, but not very well, and will burn out the battery and starter motor quickly. The car did only get 12 blocks, so it remains important for us

to prevent that Limp away [mode] ASAP." (AA 621, emphasis added [admission by Ford's Treharne].)

- "*[Thieves] can easily afford the cost of designing and building an Anti-Antitheft device*. We also publish the info necessary to identify every circuit and operatin [sic] in the vehicle. The 96's are 6 months old, it is completely logical the person with the job of thief has a full understanding of the system." (AA 621, emphasis added [admission by Ford's Greene].)

This evidence *from Ford's own employees* suffices to compel reversal of the summary judgment. But there is much more. Ford's own internal documents further demonstrate both the falsity of Ford's representations and its knowledge of the falsity. For example:

- A Ford patent application, submitted by Ford to the U.S. Government, admitted that 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." (AA 1178, 1202, emphases added.)
- The same patent application conceded: "It may also be possible to sustain operation with the engine in a start mode by electronic tampering, *allowing a thief to drive a vehicle*

away (albeit with poor engine performance)." (AA 1178, 1202, emphasis added.)

- An internal Ford document refers to television exposés on "[h]ow *theives (sic) are defeating the Ford Hi-tech Security System*," and suggests "Damage Control" through "PR and Advertising." (AA 1063-1064, emphasis added.)

Still more is captured on videotape. Emily's auto theft expert actually started and drove away a SecuriLock-equipped 1998 Ford Explorer without using the specially-coded key. It took him two minutes to defeat the system, using a small piece of wire. (AA 1337-1357, 1449 [Videotape Exhibit].)

No case here? It's an affront for Ford to suggest it. Ford's admissions are consistent with the way Emily's car was stolen and then abandoned five blocks away. It was hot-wired; the engine performed poorly; and the vehicle was abandoned after a few blocks.

The trial court prejudicially erred when it sustained Ford's demurrer without leave to amend and when it granted summary judgment.

Viable causes of action have been stated. Triable issues of fact exist. The judgment in Ford's favor must be reversed.

LEGAL DISCUSSION

I. THE COURT PREJUDICIALLY ERRED WHEN IT SUSTAINED FORD'S "SPEAKING DEMURRER."

To survive demurrer, Emily needed only to allege material facts sufficient to state a cause of action. As demonstrated in the Opening brief, Emily's complaint more than meets this standard. (AOB 12-25.)

Ford's response? It invites the Court to disregard the rules governing determinations on demurrer, to ignore the operative standard of review and to turn a deaf ear to Supreme Court precedent.

This Court should decline Ford's invitation.

A. Ford Fails To Grapple With The Standard Of Review Governing Demurrers.

For obvious reasons, Ford buries Emily's lead argument at the end of its brief. (See RB 39 et seq.) When it finally gets around to addressing Emily's arguments demonstrating the demurrer ruling was prejudicially erroneous, Ford doesn't grapple with the settled rule that an appellate court's only task "is to determine whether the complaint states a cause of action." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

Instead, Ford tries to disprove Emily's well-pleaded facts by referring to evidence favorable to Ford. (See, e.g., RB 43-44 ["respondents did in fact have reasonable grounds for believing their representations about SecuriLock were true"].) Ford asks that this Court act as a jury—something it cannot do on demurrer.

A "'demurrer admits all material and issuable facts properly pleaded.'" (*Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 218.)[1/] It is unfortunate that this elementary rule requires repetition here. However, Ford never treats the allegations in Emily's amended complaint as true and, thus, never confronts the merits of Emily's appeal.

The sole inquiry for this Court in determining whether the ruling on demurrer must be reversed is whether, viewing the allegations of Emily's complaint in the light most favorable to Emily, Emily has stated a cause of action. She plainly has.

[1/] See also *Marin v. Jacuzzi* (1964) 224 Cal.App.2d 549, 552 ["the allegations of the complaint must be regarded as true"]; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 130-131 ["[w]hen evaluating the trial court's sustaining a demurrer . . . the appellate court accepts as true all well-pleaded factual allegations, however odd or improbable"]; *Michael M. v. Giovanna F.* (1992) 5 Cal.App.4th 1272, 1276 ["We assume the facts as pleaded in the complaint are true, and draw all reasonable inferences from those facts in [plaintiff's] favor].

B. None Of Ford's Arguments Comes Close To Supporting The Order Sustaining The Demurrer.

1. Ford presents no tenable reason why the order sustaining its demurrer to Emily's fraud and negligent misrepresentation causes of action should be affirmed.

a. Emily properly pleaded the "representation" element of her fraud claims.

Ford cannot escape the legal effect of its unqualified written and oral factual representations: "Vehicle will not start without your specially coded key."

(i) Ford's representations are of fact, not opinion.

Ford argues these representations are only opinions akin to nonactionable puffing. (RB 42.)

Wrong.

The cases cited in our Opening Brief conclusively negate Ford's contention. (See AOB 19-21 [citing numerous cases holding that

representations in sales brochures are actionable].) Ford does not address *any* of these cases. Ford's silence speaks volumes.

Ford's unqualified representation to millions of consumers, including Emily, that "without the specially-coded key, your car won't start" is *exactly* the kind of actionable statement the California Supreme Court had before it in *Hauter v. Zogarts* (1975) 14 Cal.3d 104 (cited and discussed at AOB 17, 20-21). It was held actionable there. It is actionable here. Ford ignores *Hauter*.

None of Ford's cases helps Ford. For instance, *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401disapproved on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 (cited at RB 42) held only that where a defendant describes a piece of real estate as "the best," and the plaintiff has made his own personal inspection of the real estate, the plaintiff is presumed to have relied on his own inspection and not on the defendant's statement of opinion. (*Schonfeld, supra,* 50 Cal.App.3d at p. 412 ["the natural inference is that he relied on his own observations"; a bare statement of qualitative opinion (i.e., the harbor is "the best") is nonactionable "puffing"]; see also *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1383 [an opinion is a "broad, unfocused and wholly subjective comment"].)

Here, in decisive contrast to *Schonfeld*, Ford's representations were specific and categorical. And Emily—an ordinary consumer—was in no

position to verify the truth of Ford's representations or to "inspect" the adequacy of SecuriLock for herself. She is neither an engineer nor an automobile manufacturer. She is a consumer. She had to—and did—rely entirely on Ford's unconditional representations as to SecuriLock's capabilities.

If anything, *Schonfeld* supports Emily's position. As the cases cited in *Schonfeld* make clear, where a defendant (like Ford) is presumed to have superior knowledge and makes statements to induce a plaintiff to enter into a transaction, the plaintiff is entitled to rely on such representations. (*Schonfeld, supra*, 50 Cal.App.3d at p. 412 [citing *Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206, 212 (a statement is actionable if made by a defendant as "motivation to the other to enter into the transaction, or where the defendant has held himself out as particularly knowledgeable")].)[2/]

[2/] The only other case cited by Ford (RB 42) is unhelpful to Ford's position. *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 994 is a strict liability asbestos case involving a failure to warn. It has no relevance to the present case which involves neither strict liability nor a failure to warn.

(ii) Emily understood Ford's representations exactly as Ford intended them to be understood.

Ford says Emily has taken its statements out of context and that they somehow don't mean what they say. (RB 17.) Nonsense.

Ford claims its representations—that a SecuriLock-equipped car "will not start" without the special key—were read out of context. (RB 45.) Ford asserts this categorical statement must be read in conjunction with the sentence preceding it, i.e., that "SecuriLock is a passive anti-theft system which protects your vehicle electronically against theft and comes standard." According to Ford, the use of the word "protects" in the preceding sentence somehow undoes the meaning of the second sentence. (RB 17-18, 42.)

Not so. When the two sentences are read together, they mean exactly what Emily believed them to mean: That SecuriLock would "protect" against theft by eliminating one common mode of theft, hot-wiring.

Emily has never claimed Ford promised to eliminate all forms of theft. She merely claims that Ford promised to "protect" against theft by eliminating one of its most common forms—hot-wiring, exactly the type of theft used to steal her vehicle.

If ever there was an unequivocal representation of fact, Ford's representation about SecuriLock qualifies. Both sentences of Ford's written representations *support* Emily's case. Emily properly pleaded the "representation" element of her fraud causes of action.

b. Emily properly pleaded "knowledge."

Ford argues that Emily's allegations about Ford's "knowledge" are insufficient. (RB 42-43.) Ford is incorrect. By failing to address the contrary authority cited in our Opening Brief (AOB 15-16), Ford effectively concedes its argument is meritless.

Ford *does not even cite*—let alone try to explain—Supreme Court authority squarely holding that the "knowledge" element can be alleged generally, particularly where, as here, the defendant already has knowledge of the facts concerning the controversy. (See AOB 15 [citing *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217-218].)

Not only did Emily's "knowledge" pleading satisfy this general standard, it went much further. Emily pleaded specific facts showing that Ford did, indeed, know its representations were false when it made them. (See AA 96-97; AOB 15-16.) Moreover, the record contains ample evidence revealing that Ford knew its representations were false. (See

AOB 8-10, 16.) Some of this evidence is quoted in this brief's Introduction (see pp. 3-4, *supra*) and recited in detail later (see pp. 33-36, *infra*).

How does Ford respond to these authorities and factual allegations? It ignores them. It focuses instead on the conclusion of certain insurance companies that "SecuriLock would protect against theft." (RB 44.) So what? Ford disregards the rule that Emily's factual allegations must be accepted as true on demurrer. Further, whether insurance companies believed SecuriLock would "protect against theft" is irrelevant. The evidence shows SecuriLock doesn't work and that even the insurance companies were hoodwinked.

Emily pleaded facts showing that Ford had knowledge that SecuriLock did not work as represented; that a SecuriLock-equipped vehicle *could be started* without the specially-coded key. (AOB 15-16.) Emily satisfied the "knowledge" element of her fraud causes of action.

c. Emily properly pleaded "intent to defraud."

Ford argues—again, without citing any authority—that Emily needed to do more than generally allege Ford's intent to defraud. (RB 44-45.) Yet again, Ford is wrong.

The intent element can be satisfied by general allegations, especially where, as here, "'the facts lie more in the knowledge of the opposite party . . . .'" (*Committee on Children's Television, supra*, 35 Cal.3d at p. 217; see

AOB 16-17.) Ford ignores this case, despite its having been cited throughout our Opening Brief. (See AOB 13, 15, 17, 19)

Emily went further than mere general allegations here. She specifically alleged that Ford intended to sell more vehicles by misrepresenting the capabilities of SecuriLock. (AA 97; see also AOB 16-17.) Exactly this type of sales-inducing representation led our Supreme Court to state:

> [W]hen a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.

(*Kasky*, *supra*, 27 Cal.4th at p. 946.) Indeed, if a misrepresentation about a product is made in a sale context, it is presumed the maker of the representation intended to defraud the purchaser. (Cf. *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [intent to induce reliance "can be inferred from the fact that defendant knew the plaintiff would act in reliance upon the representation"].)

Ford knew it was not speaking truthfully here. Emily properly pleaded "intent." She is entitled to prove her case to a jury.

d. Emily properly pleaded "reliance."

Ford's argument that Emily failed to plead reliance flies in the face of the presumptively true facts alleged in her complaint. (RB 45.) There, Emily alleged that she relied on Ford's misrepresentations in two distinct

ways: (1) She decided to purchase a Ford Explorer, rather than any of the other cars she was considering, in reliance on the fact that SecuriLock would work as represented, and (2) she elected not to purchase additional security protections (e.g., LoJack, the Club, alarm), believing that SecuriLock would suffice. (AA 95-96; AOB 18.)

Ford's response? It points out that the Club and LoJack don't do exactly what SecuriLock does. But, so what? At least they do *something*.

To survive demurrer, Emily was not required to plead that SecuriLock was a substitute for other security measures. She was only required to allege that she took some action in reliance on defendant's misrepresentations. This she did. (AA 95-96; AOB 18.) She properly pleaded "reliance."[3/]

[3/] Ford's assertion that Emily testified in her deposition that she would have leased the Explorer even if it was not equipped with SecuriLock (RB 1) is unsupported by any citation to the record. In fact, nothing in the appellate record supports this assertion. But even if such a statement were contained in the appellate record, it would not support the ruling on demurrer for multiple reasons. First, this was not alleged in the complaint and "speaking demurrers" are prohibited. Second, even if the amended complaint and the appellate record contained such a statement (it does not), it would not be conclusive. Perhaps Emily would still have purchased the Explorer if she knew SecuriLock didn't work, but then she would then have insisted that some other security device—alarm, LoJack, the Club—be included without additional charge or that the lease price be lowered so she could purchase such protection.

e. Emily properly pleaded "damages."

Ford argues that Emily failed to plead the "damage" element because she was damaged by the acts of third party thieves, rather than Ford. (RB 46.) In addition to being nonsensical, Ford's argument is contradicted by on-point authority.

Under Ford's fanciful view, no marketer of a security device could be held liable for fraud because the thief would always be to blame. This can't be. Ford's factual representation pertained to the prevention of a certain type of theft, hot-wiring, and thus the represented efficacy of the SecuriLock contemplated an intervention by thieves. If a device is marketed as a protection against theft by eliminating hot-wiring, it is silly to say that the manufacturer cannot be held accountable because thieves caused the very damage that the device promised to prevent.

In addition to common sense, case law also squarely refutes Ford's argument. The identical argument was made by a defendant—and rejected by the Court of Appeal—in *Helm v. K.O.G. Alarm Co.* (1992) 4 Cal.App.4th 194. There, a burglar alarm company installed a system in plaintiff's home. Plaintiff specifically asked the installer what would happen if the phone line to which the alarm system was connected were to be severed. The installer responded that severance would activate an alarm signal at the alarm company's dispatch office.

Plaintiff's house was burglarized and set on fire. The telephone lines connected to the alarm were severed and, contrary to defendant's representation, no alarm signaling the break-in was ever received by the alarm company. Plaintiffs sued the alarm company, alleging that it had intentionally misrepresented the features of the alarm system. The trial court granted the alarm company's motion for a nonsuit on the ground there was no causation—that the losses were occasioned by the acts of thieves. (*Helm, supra,* 4 Cal.App.4th at p. 200 fn. 7, 201.)

The Court of Appeal reversed. It held that there is a causal nexus between the failure of an alarm system to operate as represented and losses occasioned by the criminal acts of third parties. According to *Helm,* plaintiff homeowners "justifiably relied on the representations made by the alarm company in deciding to utilize the subject alarm system *rather than seek out a system of greater protective capacity*—and *this reliance was a substantial factor in the subsequent course of events*" that led to the Helms' damages. (*Id.*, emphasis added)

So, too, here. Emily relied on Ford's representations in deciding to buy her car without purchasing any additional security devices or insisting that they be included without increase in the vehicle's price. (AA 95-96; AOB 18.) This reliance was a substantial factor in the subsequent events that led to Emily's damages. Emily had less protection than she thought she had. If the false representations about SecuriLock had not been made,

Emily would have utilized other protections, such as an alarm to frighten thieves away, the Club to discourage and hinder theft, or LoJack which would have enabled her to retrieve her car within hours or days, rather than weeks.

As a result of Ford's fraud, Emily suffered damages as alleged, including "impound fees, repair fees, car rental fees, lease payments made while her vehicle was missing, and lost time for work." (AA 98.) Emily properly pleaded damages.

Because Emily alleged each and every element of her fraud and negligent misrepresentation claims, the trial court prejudicially erred in sustaining Ford's demurrer without leave to amend.

2. Emily properly pleaded a viable cause of action under the Magnuson-Moss Warranty Act.

Ford argues—again, without citing any pertinent authority—that its representations about SecuriLock's capabilities are not warranties for purposes of the Magnuson-Moss Warranty Act (the "Act"). According to Ford, there is "no alleged statement by Ford which promised that SecuriLock (1) is defect free, (2) 'will meet a specified level of performance over a specified period of time' or (3) Ford will 'refund, repair, replace or take other remedial action.'" (RB 47.)

Ford is dreaming. Its unequivocal representation that SecuriLock-equipped vehicles cannot be started without the specially-coded key is *exactly* the kind of warranty that falls within the Act. (See *Goodman v. Perlstein* (E.D. Pa. 1989) 1989 WL 83452, *2 ["if a plaintiff had been promised that the stone was rock-solid, impervious to chipping, but when lightly tapped, it shattered, that would constitute a breach of the statutory definition of 'written warranty'"].) Ford promised that SecuriLock would meet a specific level of performance—that it would prevent Emily's Explorer from starting without the special key. SecuriLock did not meet the level of performance promised by Ford.

The only case Ford cites, *Otworth v. South Pac. Transportation Co.* (1985) 166 Cal.App.3d 452 (RB 47), has nothing to do with the Act. It doesn't mention or discuss the Act or breach of warranty claims.[4/]

Emily set out verbatim the warranties that form the basis of her complaint. (AA 92, 94, 97, 118, 121.) She also attached to her complaint both the brochure and owner's manual containing the warranties. (AA 92, 94, 97, 118, 121.)

Ford maintains—without any citation—that a marketing promise is somehow different than a warranty. As shown in the Opening Brief,

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[4/] *Otworth* held only that where an action is based on *breach of contract*, the written terms of the contract must either be set out verbatim in the complaint or a copy of the written instrument must be attached and incorporated by reference. (*Otworth, supra*, 166 Cal.App.3d at p. 459.)

numerous cases hold just the opposite. They establish that statements made by a manufacturer or retailer in an advertising brochure that is disseminated to the consuming public in order to induce sales *can* create express warranties. (See AOB 22-23.) Ford ignores these authorities.[5/]

Rather than confronting the force of Emily's authorities, Ford argues, "[t]he fact that respondents represented SecuriLock will protect against theft does not amount to a promise." (RB 47.) Of course it's a promise—a false promise.

Here, Emily alleged she relied on Ford's unequivocal, unqualified representations that "unless your specially-coded key is used, *the vehicle will not start*" and that this enabled SecuriLock to "protect against theft" by eliminating hot-wiring. (See AA 94-95.) Ford cannot conjure away the guts of these unqualified promises by attempting to torture the plain meaning and substance of the words used.

Finally, Ford argues that Emily's claim founders because she failed to allow Ford a reasonable number of attempts to repair her vehicle.

[5/] The only one of Emily's cited cases that Ford even mentions is *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20. (See RB 48 [to be actionable, "the affirmation of fact or promise must have become 'part of the basis of the bargain'"].) As discussed below (pp. 24-25, *infra*), Emily alleged that Ford's representations were the basis of the bargain. She bought the Explorer in reliance on the representations that SecuriLock would protect her against theft by precluding one form of theft, hot-wiring; and she relied on Ford's representations when she decided not to purchase any other security devices to protect her. *Keith* does not help Ford.

(RB 46-47.) No such requirement appears in the Magnuson-Moss Act, and Ford cites no authority demonstrating any such requirement.[6/] But even if there were such a requirement, it couldn't possibly apply here. Emily didn't know Ford's SecuriLock representations were false until after her stolen car was retrieved. At that point, she took the Explorer to the body shop recommended by her local Ford dealership to have it repaired. That's all she could ever be expected or required to do. She couldn't possibly be expected to request repair before she knew something was wrong.

The Act was enacted to protect consumers from deceptive warranty practices. (15 U.S.C. § 2310(d); *Miller v. Willow Creek Homes, Inc.* (7th

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[6/] Ford cites 15 U.S.C. 2304, subdivision (d), for the proposition that a consumer must give a warrantor a reasonable number of attempts to fix the problem. That is not what section 2304, subdivision (d) says. In its entirety, this section provides as follows: "For purposes of this section and of section 2302(c) of this title, the term 'without charge' means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor."

Cir. 2001) 249 F.3d 629, 630.)[7] This goal is effectuated by holding companies like Ford accountable for their false representations.

As with the fraud claims, the demurrer was wrongly sustained to Emily's Magnuson-Moss Act cause of action. That claim should be reinstated.

3. Emily properly pleaded breach of express warranty.

a. Ford's promises in its promotional materials and by its salesman are actionable warranties.

Ford argues that it cannot be liable for breach of warranty because its sales literature "did not constitute an affirmation of fact or a promise." (RB 48.) In her Opening Brief, Emily cited seven cases that hold just the opposite. (See AOB 18-22 [cases holding that statements in sales literature are actionable promises].)

Ford does not cite or distinguish a single one of these authorities. It even ignores controlling Supreme Court authority (cited at AOB 23) expressly holding that a statement made in sales literature "is one of fact

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[7] See also *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 884 ["Consumer dissatisfaction with new motor vehicles whose performance on the road differs from the representations made on the showroom floor is a long-standing problem. Some relief was afforded by the . . . passage of the Magnuson-Moss Act"].

and is subject to construction as an express warranty." (*Hauter, supra,* 14 Cal.3d at fn.10; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60 [statements in manufacturer's brochure].)

Ford next asserts that "[s]tatements of opinion constitute only dealer's talk or puffing and are nonactionable except under unusual circumstances." (RB 48.) Not surprisingly, Ford cites no case holding that an unequivocal representation of material fact—especially one dealing with an important consumer issue, security against vehicle theft—is somehow an opinion.[8/] (See pp. 8-10, *supra.*)

Finally, Ford's reliance on NHTSA's stated belief that SecuriLock "protects against theft" affords Ford no help. (See RB 44.) First, NHTSA apparently doesn't know what we know. Second, NHTSA's beliefs are irrelevant, having no effect on whether Emily properly pleaded an actionable case. Third, Ford (and NHTSA) refer only to the "protection" part of the representation, ignoring the controlling representation that "[v]ehicle will not start without your specially coded key." (RB 44; see pp. 11-12, *supra.*) Fourth, there is no "conflict" (RB 44) between

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[8/] Even if Ford's representations could somehow magically be construed as opinions, Ford would still not succeed. It has failed to explain or distinguish Supreme Court authority (cited in the Opening Brief, AOB 23, n. 13) holding that "even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra,* 14 Cal.3d at p.115, n.10.) Here, Emily alleged that Ford's statements regarding SecuriLock were a key basis of her bargain. (AA 94-96; see also pp. 24-25, *infra.*)

NHTSA's statement that "Ford has provided adequate reasons for its belief that the antitheft device will reduce and deter theft" and Emily's allegations that Ford knew the falsity of its representations. Ford is the defendant, not NHTSA. That Ford may have succeeded in duping NHTSA (as it duped Emily and millions of other consumers) merely reaffirms why Ford should be brought to trial.

Ford's sales representations are express warranties. If they're not, then there's no such thing as warranty law in California.

b. Emily explicitly alleged that Ford's misrepresentations formed the basis of her bargain.

Ford states that "the First Amended Complaint failed to allege any facts that demonstrated the advertising about SecuriLock had become the basis of the bargain." (RB 49.) This ignores the governing standard of review and misrepresents the substance of Emily's complaint.

First, Emily did not have to "demonstrate" anything on demurrer. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 ["A demurrer admits all material and issuable facts properly pleaded"].) Emily needed only to allege that she relied on Ford's representations when she decided to lease her vehicle. This she did. (AA 98.)

Ford's response? A flat-out misrepresentation. According to Ford, "Nowhere is it alleged in the complaint that [SecuriLock]. . . was the basis of the bargain of her [decision] to enter into the lease." (RB 49.) But Emily alleged that had she known SecuriLock did not work as represented, "she would not have leased the Ford Explorer, or she would have purchased additional protections or services in order to attempt to diminish the likelihood that her Ford Explorer would be stolen, or she would have negotiated the price of the Ford Explorer accordingly." (AA 96.) A working SecuriLock system was central to Emily's bargain.

c. The error in sustaining the demurrer was highly prejudicial.

Ford argues that even if the trial court erred in sustaining the demurrer, the error was harmless. (RB 49-50.) Absurd! How can it be harmless error when the effect of the ruling is to dismiss Emily's well-pleaded claims and prevent her from trying them to a jury?

Nothing could be more prejudicial. (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 775 ["When a trial court sustains a demurrer, 'reversible error exists if [plaintiff's well-pleaded] facts show entitlement to relief under any possible legal theory'"]; *Dubins v. Regents of University of California* (1994) 25 Cal.App.4th 77, 82 ["The trial court commits reversible error when it sustains a demurrer without leave to amend where

the plaintiff has alleged facts showing entitlement to relief under any available theory"].)

Ford invites the Court to look ahead to summary judgment. (RB 50 ["appellant never come [sic] forward with any evidence that created a triable issue of fact on any cause of action . . . including those that were sustained on demurrer"].) But neither the trial court nor this Court may speculate on Emily's ability to support, at trial, her well-pleaded allegations. (*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'"].) Ford cites no authority to the contrary.[9/] Moreover, Ford's summary judgment motion did not even address the causes of action that were erroneously dismissed on demurrer.

The order on demurrer must be reversed and Emily's well-pleaded fraud and breach of warranty claims must be permitted to go forward.

[9/] The sole case Ford cites, *County of Monterey v. W.W. Leasing Unlimited* (1980) 109 Cal.App.3d 636, 642, has absolutely no bearing here, as that case did not involve a demurrer. Quite to the contrary, *County of Monterey* involved a trial court's failure to give a requested jury instruction. The Court of Appeal held that because the plaintiff had failed *at trial* to produce evidence supporting his claim, the failure to give the instruction was not prejudicial. (*County of Monterey, supra,* 109 Cal.App.3d at p. 642 ["Where the judgment is 'the only proper one in the state of the record,' even substantial error is not reversible].)

II. FORD FAILS TO PRESENT ANY TENABLE REASON WHY THE PREJUDICIALLY ERRONEOUS SUMMARY JUDGMENT RULING SHOULD BE UPHELD.

A. Contrary To Ford's Assertions, The Court May Not Act As A Jury.

Ford never grapples with the rules requiring that, in a summary judgment proceeding, Emily's facts must be assumed true and all inferences must be drawn in Emily's favor. Rather than confronting the evidence viewed in this fashion, Ford ignores the evidence and relies on its own evidence instead. This is fatal to Ford's appellate position.

What Ford does here is ask this Court to reject the favorable inferences stemming from Emily's evidence to the extent such inferences conflict with Ford's testimony. The law is completely to the contrary.

The evidence must be viewed in the light most favorable to Emily, *the non-moving party*. (*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 party losing below].) Numerous cases so hold.[10/]

[10/] See, e.g., *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 999 [court must view the facts "in the light most favorable to the nonmoving party" and must assume that "the [nonmoving party's] version of all disputed facts is the correct one"]; *Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 175-176 ["The facts alleged in the affidavits of the party against whom the [summary judgment] motion

Ford overlooks this elementary principle. Triable issues of fact exist on all of Emily's claims. Summary judgment is impermissible.

B. Contrary To Ford's Contentions, Ford Did Not "Shift The Burden" To Emily To Demonstrate That Triable Issues Of Fact Exist; Indeed, Ford Never Carried Its Initial Burden Of Showing One Or More Elements Of Emily's Causes Of Action Could Not Be Established.

Ford is the moving party on summary judgment, yet it believes that it has no burden of proof; that it has somehow shifted the burden to Emily to show that triable issues of material fact exist. (RB 13-14.) Ford is wrong. If Ford were correct, the law of summary judgment would be upside down.

Under the law, a moving party seeking summary judgment must establish that "one or more elements [of plaintiff's cause of action] . . . cannot be established." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [citing Civ. Proc, § 437c, subds. (a)(o)(2)].) Only after *the moving party* has met that burden must the plaintiff respond with admissible evidence raising a triable issue. (*Ibid.*; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, emphasis added ["from

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is made must be accepted as true"].) Moreover, this Court cannot sit as a jury. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879 ["the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact"].

commencement to conclusion, *the party moving for summary judgment bears the burden* of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law"]; *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 547, emphasis added ["A court may grant summary judgment only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. *It was defendant's burden* to establish that no triable issue of facts remained"].)

Ford pretends these rules do not exist. It does so because it did not come close to carrying its burden here.

Ford believes that *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573 permitted it to shift the burden of proof to Emily. Not so. That case simply allows a court to infer from a plaintiff's factually devoid discovery responses *and* a *lack of any other evidence* produced in opposition to summary judgment that the plaintiff cannot prove a case.[11/]

[11/] *Union Bank* examined the language of Civil Procedure section 437c, subdivision (o)(2), which allows shifting the burden of proof on summary judgment to the nonmoving party, but *only if "one or more elements of the cause of action . . . cannot be established."* (*Union Bank, supra*, 31 Cal.App.4th at pp. 583-584, emphasis added; see also *id* at pp. 580-581.)

Union Bank noted (*id.* at p. 585) that the legislative history of subdivision (o)(2) showed that it was based on Federal Rules of Civil Proc., Rule 56 and the interpretation of that section in *Celotex Corp. v. Catrett* (1986) 477 U.S. 317 [106 S.Ct. 2548, 91 L.Ed.2d 265]. (*Union Bank, supra,* 31 Cal.App.4th at p.585.) *Celotex* permitted burden shifting where the plaintiff never produced *any* admissible evidence in its opposition to summary judgment tending to prove its case. (*Celotex, supra*, 477 U.S. at pp. 319, 322-328 [106 S.Ct. at pp. 2551-2555 [where plaintiff adduced no

This is not our case. Far from it. Here, Emily's discovery responses were not deficient *and* she produced abundant evidence on which a jury could find her car was stolen by hot-wiring in contravention of Ford's explicit representations. (See discussion in section II.C., *infra*.) This precluded burden shifting here. (See, e.g., *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186 ["before burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant . . . should be required to produce direct or circumstantial evidence that the plaintiff not only does not have *but cannot reasonably expect to obtain* a prima facie case," emphasis added]; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 173-174, emphasis added ["The moving party's 'simply pointing to' the absence of evidence supporting plaintiff's position is not in itself enough to obtain summary judgment in its favor. There must be some 'affirmative showing' by the moving defendant that plaintiff *could not obtain such evidence*, before summary judgment would be proper"]; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83

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evidence to support its case, defendant need not file affidavits negating plaintiff's claims, but could rely on plaintiff's factually devoid discovery responses].)

["the burden should not shift without stringent review of the direct, circumstantial and inferential evidence"].)[12/]

Here, Emily presented substantial evidence showing there are triable issues of fact. Ford never met its burden. The burden never shifted to Emily.

C. Emily Presented Abundant Evidence Showing That There Were Triable Issues Of Fact To Support Her Causes Of Action For Deceptive Trade Practices, Negligence, And Breach Of Business & Professions Code § 17200 Et Seq.

The evidence Emily submitted in opposition to the summary judgment motion establish—overwhelmingly, we submit—that Emily has a prima facie case entitling her to a jury trial. Consider the following:

[12/] Even if Emily hadn't submitted extensive evidence showing her car had been hot-wired, it would still be inappropriate to shift the burden of proof. This is so because where, as here, a defendant misleads a plaintiff in discovery, it is inappropriate to shift the burden of proof. (*Krantz*, *supra*, 89 Cal.App.4th at pp. 172, 174 ["[I]n cases in which the opposing party (usually the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete, the motion for summary judgment should not be granted"; held, error to shift burden of proof to plaintiff where he failed to "obtain the evidence sought in discovery"].) The present case is the same. (See AOB 32-36 [Emily did not receive key responsive documents and timely moved to continue the hearing on summary judgment when she learned that Ford had withheld crucial information]; see also discussion in section III.B, *infra* [Ford hid key documents].)

- On the night of the theft, Emily locked her car and removed the specially-coded key. (AA 92, 539.)
- Emily's car was missing the next day, thus permitting a trier of fact to conclude that it was stolen. (AA 92.)
- The physical damage to Emily's car was consistent with hot-wiring theft. (See, e.g., AA 92, 111, 540, 545-547 [punched-out ignition lying in pieces on the floor; the car showed signs that the thief had been under its hood]; 628-631 [post-theft repair records showing 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]; AA 363-364 ["ignition switch was popped out and the wires ruined in the dashboard and steering column. The passenger side lock was ruined"]; AA 365 [repairs occasioned by the theft were consistent with hot-wiring; repair of internal wires of dashboard, replacement of ignition column, fixing "the computer coding in the ignition"].) As numerous cases hold, *these facts alone* permit a jury to conclude that Emily's car was hot-wired. (See below.)

- The pictures Emily attached to her complaint show damage consistent with hot-wiring. (AA 369-370 [Response To Form Interrogatory No. 12.4].)
- Numerous auto theft cases have observed that the facts present in Emily's case create an inference of hot-wiring. (See, e.g., *Clark v. Bellefonte Ins. Co.* (1980) 113 Cal.App.3d 326, 330 ["The ignition lock was punched, indicating it had been hot wired"]; *Vaughn v. Noor* (1991) 233 Cal.App.3d 14, 18 ["The ignition had been 'punched,' a method used by thieves to steal cars"]; *People v. Lopez* (1963) 222 Cal.App.2d 682, 684 [torn-out ignition wiring and tin foil found on defendant indicated car had been hot-wired]; *People v. James* (1984) 157 Cal.App.3d 381, 384, 387 [where "ignition had been punched out," the only way to start car was by hot wiring].)
- Ford engineer and SecuriLock creator Treharne admitted that SecuriLock-equipped vehicles could be started and driven away without the specially coded key. This could be accomplished, he admitted, by the "limp away mode" and electronic bypass methods. (AA 1034-1039; see also AA 618-622.)

- Internal Ford documents refer to exposés on two network television shows reporting on "[h]ow theives (*sic*) are defeating the Ford Hi-tech Security System." They also refer to a nadir in "probable customer perception," calling for "Damage Control" through "PR and Advertising." (AA 1063-1064.)

- Internal e-mails and internal documents contain multiple admissions by Ford's own employees:

  (1) ". . . PATS [SecuriLock] is not really an effective theft deterrent. . . My Mustang was stolen yesterday morning . . . Seems whoever stole it simply drove past the guard. . . I guess it was running OK." (AA 618 [admission by Ford employee Greene].)

  (2) "We need the upgrades to the [SecuriLock] system to close the loopholes. When I said the Mustang was HIGH RISK [for theft], I was not kidding!!!!!" (AA 620 [admission by Ford engineer and creator of SecuriLock, Treharne].)

  (3) "The thieves could have used the 'Limp Away' mode [to defeat SecuriLock] . . . but they would have had to use a screwdriver to ratchet the ignition off then on to

start again." (AA 621 [admission by Ford engineer and SecuriLock creator, Treharne].)

(4) "With the electrical bypass [method for defeating SecuriLock], the thieves have to cut some wires or other attack methods to make it work." (*Ibid.*)

(5) "The screwdriver method [for defeating SecuriLock] works, but not very well, and will burn out the battery and starter motor quickly. The car did only get 12 blocks, so it remains important for us to prevent that Limp away [mode of hot-wiring] ASAP." (*Ibid.*)

(6) "I also got a call from Europe that said the newspaper published an article on how to defeat the Ford anti-theft system." (AA 621 [admission by Greene, Ford employee].)

(7) "[Thieves] can easily afford the cost of designing and building an Anti-Antitheft device. We also publish the info necessary to identify every circuit and operatin [sic] in the vehicle. The 96's are 6 months old, it is completely logical the person with the job of thief has a full understanding of the system." (*Ibid.*)

- A Ford patent admitted that, "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." (AA 1178, 1202, emphasis added.)

- The patent further admitted, "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.)
- At an internal Ford meeting, Treharne stated that SecuriLock 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.)
- A Ford employee'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 Treharne initially concluded SecuriLock was likely defeated via the "limp away" mode. (AA 618-622, 1160.)
- Finally, Emily's expert Painter succeeded in defeating SecuriLock within two minutes, using a small wire. (AA 1449.) He then drove the car away.

This evidence is completely consistent with the way Emily's car was stolen and then abandoned five blocks away. The SecuriLock system on

her vehicle was bypassed, the engine was started and performed poorly, and the vehicle was abandoned several blocks away.

When this evidence is construed most favorably to Emily and all reasonable inferences are drawn in Emily's favor, a jury could easily conclude that the theft more probably than not occurred by hot-wiring—all in contradiction to Ford's representations and warranties.[13/] In this respect, Emily's proof differs decisively from that in *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472 (cited at RB 14-15), where the plaintiff failed to produce *any evidence* showing that her rapist entered the building through the broken security gate.[14/] (*Leslie G.*, *supra*, 43

[13/] Ford contends that the theft was accomplished by pushing or towing. (RB 14-15.) This is a jury argument that cannot be considered on summary judgment because it disputes—rather than assumes the truth of—the evidence favorable to Emily.

Moreover, Emily's evidence refutes the inferences Ford impermissibly tries to draw. First, Emily's vehicle was a large SUV. The notion that thieves decided to make their getaway by pushing it through a densely-populated urban environment is preposterous. The fact that another vehicle was parked directly behind Emily's car makes pushing even less likely. Further, when Emily's car was recovered, it had not been stripped of marketable parts. (AA 541.) As Emily's auto theft expert noted, "it is highly unlikely that a thief would push or tow a stolen vehicle for five blocks and then abandon the vehicle without stripping it." (AA 550.) Next, of the 10,000 theft-recovered vehicles Emily's expert had personally repaired, he had only seen two that had been stolen via pushing or towing. (AA 551-552.) Finally, to the extent there is any physical evidence of towing, it is wholly consistent with Emily's car having been towed twice after it was retrieved, first by the police and later by Harry's Auto Collision Center. (See AA 541, 429.)

[14/] In *Leslie G.*, there was *no evidence whatsoever* of how the rapist entered the garage and there were multiple non-culpable ways in

Cal.App.4th at pp. 483-484 [noting that plaintiff had failed to present evidence that broken gate was most likely point of entry].)

Since Emily's evidence demonstrated that a jury could conclude that it was more likely than not that her vehicle was stolen by hot-wiring, summary judgment was prejudicially erroneous. The judgment must be reversed.

D. Triable Issues Of Fact Exist Regarding Emily's Claims Under Business & Professions Code § 17200 Et Seq.

1. Emily showed ford made false representations likely to deceive consumers.

Triable issues of fact also exist in support of Emily's claims under Business & Professions Code, section 17200 et seq. ("UCA"). (See AOB 28-30.) To establish a UCA violation, a plaintiff must show that "members of the public are likely to be deceived" by a company's deceptive marketing practices. (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 871.) As we have demonstrated, there is ample evidence on which a

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which entry could have been achieved. (*Leslie G., supra*, 43 Cal.App.4th at pp. 481-482.) Thus, there was no causal connection shown between the broken security gate and the rape. (*Id.* at pp. 483-484.) In this respect, *Leslie G.* is far afield of our case, where Emily presented ample evidence showing hot-wiring to be the most likely means of theft, more likely than any conceivable alternative means.

jury could easily conclude that consumers, including Emily, were deceived by Ford's false representation that "Unless your specially coded driver's key is used, the vehicle won't start." (See, e.g., AOB 29-30.)

Ford tries to minimize the impact of its misstatements by arguing that "a company's advertising need not be perfect or without mistakes." (RB 16.) That's not the point. If a company makes a representation that qualifies as "untrue or misleading advertising," that suffices alone to permit suit. (See Business & Professions Code section 17200 et seq.) Here, as demonstrated above, there is evidence that Ford's representations were false and misleading.

The sole case Ford cites (*Klein v. Earth Elements Inc.* (1997) 59 Cal.App.4th 965) doesn't support Ford. There, a manufacturer unwittingly distributed contaminated pet food. Plaintiff argued that because the company advertised its product as healthy for pets, it had committed a fraud upon the public. (*Klein, supra,* 59 Cal.App.4th at p. 970.) The Court of Appeal disagreed, holding that the company "did nothing to cause the consuming public to accept the contaminated food as uncontaminated; indeed, by instituting a speedy and extensive recall effort, the company did what it could to inform the public of the problem." (*Id.* at p. 970.)

Here, in decisive contrast, the evidence shows that Ford *knew* in advance that SecuriLock could be circumvented, yet it persisted in falsely advertising the system without disclosing that it could be defeated. Ford

took no steps to inform the public or to recall the known-to-be-defective vehicles. When Emily wrote Ford a letter explaining that her car had been stolen by hot-wiring, Ford could not care less. It never responded, never sought to investigate, never expressed any concern and never sought to determine whether her complaint disclosed a defect in the SecuriLock system. (See AA 96, 114-116, 540-541.) Ford didn't respond because it already knew SecuriLock didn't work.

This is precisely the kind of unfair business practice the UCA was designed to combat. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ["statutory 'unfair competition' extends to all unfair and deceptive business practices"].)

Ford argues Emily has no evidence that her vehicle or any other SecuriLock-equipped vehicle had been or could be started and driven without the specially-coded key. (RB 16.) Ford ignores the evidence discussed in pp 32-36 above and never deals with the summary judgment rule requiring that Emily's evidence be treated as true. Rather than grappling with the evidence viewed in light of this rule, Ford relies exclusively on its own pleadings and the self-serving deposition testimony of its own employee, Treharne. (RB 16 [citing RA 1119-1120, 1124 (Ford's supplemental reply to plaintiff's supplemental opposition to summary judgment); RA 1132-33, 1148-50 (excerpts from deposition

transcript of Treharne)].) This is exactly the kind of situation where summary judgment is impermissible. As Justice Mosk recently observed:

> The Supreme Court [has] emphasized that a summary judgment cannot be granted on the basis of a weighing of evidence or resolution of conflicting, material facts. Thus, for example, if the credibility of witnesses was determinative, summary judgment would be inappropriate.

(*Kids' Universe*, *supra,* 95 Cal.App.4th at p. 890 (conc. opn. of R. Mosk, J.).)

Contrary to Ford's assertions (RB 16), Emily was not required to show on summary judgment that her car (or any other SecuriLock-equipped car) was actually hot-wired. Instead, Emily only needed to show there is a triable issue of fact as to whether SecuriLock-equipped vehicles could be started without the specially-coded keys. (*Wang, supra,* 97 Cal.App.4th at p.871 [plaintiff need not show anyone was "actually deceived, relied upon the fraudulent practice, or sustained any damage"; held, summary judgment on 17200 claim reversed]; *ibid.* [to state a claim under section 17200, plaintiff need only show that "members of the public are likely to be deceived"].) Emily proved that here. The jury should decide the ultimate issue.

2. None of ford's arguments disproves the existence of triable issues of fact on Emily's claims under Business & Professions Code, section 17200, et seq.

Rather than meeting the appellate summary judgment standard that requires Ford to accept Emily's evidence and all reasonable inferences therefrom as true, Ford does the opposite. It improperly presents the evidence in the light most favorable to it. This further illuminates why triable issues of fact really do exist.

a. Contrary to Ford's assertion, Ford did promise that SecuriLock-equipped vehicles could not be started without the specially-coded key.

Ford argues it "did not 'promise' SecuriLock equipped vehicles could not be started without the specially coded key" because it only represented that SecuriLock "*protects* a vehicle from theft." (RB 17.)

The representations themselves belie this claim. As demonstrated above, Ford ignores its categorical representation, "Vehicle will not start without your specially coded key." (*Ibid.*) This is not puffing. (See pp. 8-10, *supra.*) This is a promise—a promise that Emily (and the American

public) legitimately believed would "protect" against a common form of theft, hot-wiring.

b. Contrary to Ford's assertions, Emily presented evidence showing SecuriLock didn't work and that Ford knew it.

Ford argues that Emily produced no evidence showing it knew SecuriLock-equipped vehicles could be hot-wired. (RB 18.) Once again, Ford ignores the evidence that damns it—the evidence discussed above that shows Ford knew and internally admitted that SecuriLock was flawed. (See discussion at pp. 32-36, *supra*.)

Ford tries to explain away this evidence, but the time to do that is in front of a jury, not on summary judgment and not on demurrer. As Emily's evidence plainly demonstrates, triable issues of fact exist on her UCA claim.

E. Triable Issues of Fact Exist Regarding Emily's Deceptive Trade Practices And Negligence Claims.

1. Once again, Ford fails to address the evidence in light of the governing standard of review.

Ford attempts to show an absence of triable issues of fact as to Emily's deceptive trade practices and negligence claims (collectively, the

"CLRA" claims). (RB 22-26.) Ford's contentions suffer from the same faults as its attempts under Emily's other causes of action. In particular, Ford improperly relies entirely on the testimony of its own employees, ignoring Emily's evidence. On summary judgment, a court may not weigh conflicting evidence and the credibility of witnesses. (See *Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 822 [courts may not resolve questions about a declarant's credibility on summary judgment].)

2. None of Ford's arguments negates the existence of triable issues of fact.

a. Ford failed to demonstrate that Emily's 1998 vehicle was equipped with a SecuriLock system that differed in any way from the pre-1998 system that Ford admits could be circumvented.

Ford argues that even if pre-1998 SecuriLock-equipped cars could be hot-wired, Emily's car—a 1998 Explorer—could not because it contained a patented "fix." (RB 24.) This assertion is not supported by any evidence that can properly be considered in support of Ford's summary judgment motion, nor is there any evidence that the asserted "fix" caused SecuriLock

to work any better than the pre-1998 SecuriLock that Ford concedes did not work as represented.

First, the asserted "fix" was not presented in Ford's motion for summary judgment and was not referred to in Ford's separate statement (RA 476-485); it did not emerge until it was referred to for the first time in Ford's reply papers. (AA 800-801.) Accordingly, the evidence cannot be considered. (Code Civ. Proc., § 437c, subd. (a) [all supporting papers and separate statement must be served with original motion]; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 (superceded by statute on another ground) ["This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*"].) As one court declared: "'Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement.*'" (*Ibid.*; see also *Department of General Services v. Superior Court* (1978) 85 Cal.App.3d 273, 284 ["because of the drastic nature of the remedy" of summary judgment, the moving party "is held to strict compliance with the procedural requisites"].) Here, the separate statement contained not a word—not even a hint—about the supposed "fix." (RA 476-485.)

Second, even if the supposed "fix" evidence could be considered, it didn't prove the SecuriLock system on Emily's car was any better than the deficient system on predecessor cars. The only "proof" Ford cites to show

Emily's car was equipped with an improved version are the declarations of Ford employee Treharne. The first of these declarations (RA 834) was submitted in support of Ford's reply to Emily's opposition to summary judgment. It was not mentioned in Ford's separate statement and thus cannot support the summary judgment ruling. (See p. 45, *supra.*)

The second Treharne declaration was not even submitted in connection with the summary judgment proceeding. (See RB 24 [citing RA 1472-1477].) Moreover, it proves nothing. It declared only that, "All 1998 Ford Explorers are equipped with the same version SecuriLock. The SecuriLock system installed on plaintiff Emily Greines' 1998 Ford Explorer is the same version of SecuriLock that is installed on all 1998 Ford Explorers." (RA 1476.) It is impossible to see what relevance or probative value this declaration has. It certainly doesn't show that the SecuriLock system was fixed.

Finally, the second Treharne declaration was not submitted in connection with the summary judgment motion. Rather, this declaration was only submitted in connection with the later-filed motion for reconsideration. (RA 1473-1477 [Treharne declaration in support of opposition to motion for reconsideration].) Thus, the Treharne declaration affords no basis for granting summary judgment. (*Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 282 [court rules on summary judgment based on the papers submitted on the motion]; *Kline v. Turner* (2001) 87 Cal.App.4th

1369, 1373 ["We independently review the parties' papers supporting and opposing the motion, using the same method of analysis as the trial court. Essentially, we assume the role of the trial court and apply the same rules and standards"].)

b. Contrary to Ford's assertion, the Tengler graphs create a triable issue of fact.

In opposing summary judgment, Emily produced two 1996 graphs, obtained in discovery from Ford and created by Ford employee Tengler. The graphs reveal that Ford was aware that thieves knew how to circumvent SecuriLock and that public relations "damage control" would be needed if two television programs aired on "How theives [*sic*] are defeating the Ford Hi-tech Security System." (AA 1063-1064; see AOB 32-33.)

Ford argues that the television shows referenced in the graphs never aired and, thus, the graphs cannot create a triable issue of fact. (RB 25-26.) More nonsense. It doesn't matter whether the television shows exposing the shortcomings admitted in the graphs ever aired. What is relevant is that a jury could conclude from this internal Ford document that Ford knew SecuriLock wasn't working and anticipated bad press as a result.

At trial, Ford is certainly free to try to explain away the admissions and inferences stemming from its internal graphs, but Ford cannot keep the case from the jury on that basis.

c. Contrary to Ford's assertion, Treharne's self-serving statements as to how Emily's and Greene's cars were stolen bear no weight on summary judgment.

Ford contends it is entitled to summary judgment because its employee Treharne concluded that neither Emily's car (nor Ford employee Greene's car) had been hot-wired. (RB 5-6, 25.) In other words, Ford argues that this Court must accept Treharne's testimony as true, and reject the contrary evidence. Not so. This is a jury question, not resolvable on summary judgment. (*Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 601 [denying summary judgment where there are competing factual inferences].)

d. Contrary to Ford's assertions, Emily may seek damages under a negligence theory.

Ford cites *Seely v. White Motor Co.* (1965) 63 Cal.2d 9 for the proposition that manufacturers cannot be liable for economic damage where there is no physical injury. (RB 21, fn. 5.) Not so.

In fact, *Seely*, a product liability case, holds precisely the contrary. It rules: "The doctrine of strict liability in tort should be extended to govern

physical injury to plaintiff's property, as well as personal injury." (*Id.* at p. 19.)

Although our case is not a strict liability case, *Seely* supports our position. It does not support Ford's.

e. Contrary to Ford's assertion, what was or was not discussed at Ford's "cert review" meeting is immaterial to the propriety of the summary judgment ruling.

Ford asserts there is no evidence as to what Ford discussed at its internal "cert review" meeting. (RB 24-25.) So what?

The question here is whether the summary judgment ruling must be reversed. That depends solely on whether there are triable issues of fact. There are.

In any event, Ford is wrong on the facts. Emily *did* present evidence as to what was discussed at the "cert review meeting." (See AA 620-621, 1160, 1165.) She demonstrated that the meeting included a description of the "limp away mode" of theft, whereby a SecuriLock-equipped vehicle can be hot-wired using "a screwdriver to ratchet the ignition off then on to start again." (AA 621, 1165-1166.) The meeting concluded with a request by Ford engineers that the company fix the flaws in SecuriLock to preclude such hot-wiring thefts. (AA 1165-1166.)

Summary judgment must be reversed. Ford's motion did not demonstrate the absence of triable facts and Emily's opposition demonstrated that triable issues of fact exist.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT STRUCK THE DECLARATION OF EMILY'S EXPERT, FAILED TO REOPEN DISCOVERY, AND DENIED EMILY'S MOTION FOR RECONSIDERATION.

If the Court agrees that the demurrer and summary judgment motions were improvidently granted and must be reversed, it need not reach the issues discussed below. If, however, the Court has any doubts about whether the trial court erred in granting summary judgment, the discussion below affords additional reasons why summary judgment must be reversed.

A. The Trial Court Abused Its Discretion By Striking The Declaration Of Emily's Expert.

A central question presented in this case is *whether* Emily's car was hot-wired; if a thief can bypass SecuriLock, it is irrelevant how the defective system is designed. (AOB 42-43.) As the trial court itself acknowledged, Emily's expert, Robert Painter, is an expert in auto theft.

(AA 1422-1423 ["Painter clearly has expertise in the area of auto thefts"].)[15/]

Auto theft is exactly what this case is all about. Thus, Painter's expertise pertains directly to the core issue. (See Evid. Code, § 720, subd. (a) [expert witness must have "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates"]; *Miller v. Silver* (1986) 181 Cal.App.3d 652, 659 [trial court abuses its discretion "if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go before the trier of fact"].)

The trial court prejudicially erred when it struck Painter's declaration. It reasoned that Painter had insufficient "training, experience, education or knowledge in the operation of the electrical passive anti-theft system." (AA 1423; see AOB 42-43.) But this is misguided. If SecuriLock can be defeated or bypassed, then it matters not how the system internally operates. If it doesn't work, it doesn't work. Here, it didn't work.

[15/] The record reveals Painter's extensive credentials in auto theft investigation. (See AA 544-545, 555-560.) Over the course of 15 years, Painter was involved in the evaluation and repair of over 10,000 theft-recovered vehicles. (AA 544.) He has worked with law enforcement and insurance companies investigating recovered vehicles. (AA 544-545.) He has written books and articles regarding vehicle security. (AA 545, 556-557.) He even holds a patent for a device designed to prevent car thefts. (AA 545.) And, he was able to start and drive away—*in just two minutes*—an Explorer of Emily's car's vintage without the specially-coded key. (AA 1449 [videotape exhibit]; RA 1413-1417.)

Since Painter is an expert in hot-wiring and was prepared to testify that Emily's Explorer was hot-wired, that's all Emily needed in order to prove that Ford's representations about SecuriLock were false. If Painter could start an Explorer exactly like Emily's without the specially-coded key, as he actually did, it didn't matter whether he knew squat about the design details of the SecuriLock system.

Even if an expert has only generalized expertise, his testimony should be admitted if it can assist the trier of fact. For instance, in *Miller v. Silver, supra,* 181 Cal.App.3d 652, a patient sued a surgeon for failing to administer antibiotics prior to surgery. (*Id.* at pp. 656-657.) The trial court struck the declaration of the patient's expert, a psychiatrist, because he was not trained in surgery. (*Id.* at p. 657.) The Court of Appeal reversed, holding that although the expert lacked specialized credentials to give expert testimony on surgical techniques, he could still testify as to the efficacy of administering antibiotics to avoid post-surgery complications and would be subject to vigorous cross-examination concerning his qualifications and credibility. (*Id.* at pp. 660-661 [testimony of a nonspecialist can still aid the trier of fact "in the search for the truth"].)

The present case is closely analogous. Although Robert Painter is not a specialist in Ford's SecuriLock system, he is an expert in auto thefts, which is what our case is about. (See fn. 15, *supra.*) Because Painter's

testimony would indisputably aid the trier of fact, the trial court abused its discretion when it struck his declaration.

B. The Trial Court Abused Its Discretion by Failing To Reopen Discovery.

1. Ford Misled Emily During Discovery.

The Opening Brief demonstrates that Ford engaged in discovery gamesmanship. (AOB 11, 34-36.) Ford fought Emily every step of the way, forcing her to file no less than four motions to compel production of documents, depositions and responses to her interrogatories. (See AA 155, 165, 447, 688) Both Ford and its counsel were sanctioned for their discovery misconduct. (AA 983.) Ford's disingenuous effort to now portray itself as cooperative defies the record.

Given Ford's stonewalling and the fact that it withheld documents that were responsive to earlier discovery, and the fact that it changed its theory of non-liability at the eleventh hour, the trial court abused its discretion by failing to reopen discovery. (See AOB 34-39.)

2. Ford Improperly Failed To Produce All Responsive Documents When It Was Required To Do So On March 7, 2000.

Ford argues that it produced all documents responsive to Emily's discovery requests on March 7, 2000. This is untrue.

Here's what happened. In August 1999, Emily requested that Ford produce *all* documents relating to, among other things, the development and/or design of and/or testing of the SecuriLock system. (AA 1201, 1209.) After a delay of almost seven months, Ford finally produced about 1,700 documents on March 7, 2000. (AA 1189, 1201.)

Nothing in Ford's document production revealed that Ford privately knew and believed that a thief could circumvent SecuriLock. Yet, in its September 2000 reply papers in support of its motion for summary judgment, Ford claimed *for the first time* that it had "fixed" the SecuriLock technology that had allowed vehicles to be hot-wired prior to 1998. (AA 800-801.) Then, in September 29, 2000—months after Ford filed its summary judgment motion—Ford finally "produced" a new document. This document—a patent application—admitted that SecuriLock could be defeated and that a "fix" had been invented to address the problem. (AA 1178, 1202.)

This document had not previously been produced and was not included in Ford's March 7, 2000 production. Ford's theory that a "fix" had been implemented on Emily's vehicle was *not* advanced in support of its motion for summary judgment, but rather it was advanced *for the first time* only in its reply papers. As shown above, this was too late to be used in support of its summary judgment motion. (See discussion and citations, *supra*, at p. 45.)

a. Contrary to Ford's contention, evidence concerning the potential "fix" was never disclosed prior to September 2000.

Ford contends that it gave Emily the "fix" patent in March 2000. (RB 33.) The record belies this contention.

Ford cites only (1) an excerpt from its opposition to plaintiff's motion for reconsideration, and (2) an excerpt from the declaration of Treharne in support of the same. (RB 33 [citing RA 1438, 1474].) Both refer only to a document called "PATS FS F8DB 19A366 AA." (See RA 1438, 1474.) But "PATS FS F8DB 19A366 AA" proves nothing that is pertinent. It is *not* the same document that Ford produced for the first time

on September 29, 2000. It has nothing whatever to do with the supposed hot-wiring fix.[16/]

The relevant patent is Patent No. 5,703,413. It is *this patent* that was not turned over until September 29, 2000. This is the patent that was supposed "to prevent an unauthorized user from moving the vehicle more than a small amount." (AA 1178.) It describes the problems with prior patented SecuriLock system as follows:

> 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 electronic tampering, allowing a thief to drive a vehicle away (albeit with poor engine performance).

(AA 1178.)

This is exactly what Emily's case was about, yet Ford hid the document until after its summary judgment motion and Emily's response was filed. Ford attempts to take refuge in the fact that Treharne mentioned Patent No. 5,703,413 in passing in a declaration dated August 7, 2000.

[16/] "PATS FS F8DB 19A366 AA" describes technology that permits a car's engine to operate even if the SecuriLock system loses power. (RA 1474.) As Ford itself explains, this technology is designed to prevent the engine from being disabled while the vehicle is being driven. (RB 29 ["[I]f a SecuriLock equipped vehicle was being driven on the Freeway when a malfunction in the system occurred, and SecuriLock disabled the engine [], an accident and serious injuries could result. SecuriLock is designed to prevent this very scenario from occurring"].) This has nothing to do with the technology purporting to prevent hot-wiring.

(RB 38 [citing RA 465].) But this simply affords further proof why Patent No. 5,703,413 should have been turned over when *all* responsive documents were required to be turned over, i.e., on March 7, 2000.

Moreover, Treharne's off-hand reference to Patent No. 5,703,413 in the context of listing seven other patents he holds[17] is not the same as producing the patent itself, as Ford was required to do.[18]

Ford cannot seriously dispute that it first produced Patent No. 5,703,413 on September 29, 2000—seven months late. (AA 1174-1179.)

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[17] The relevant excerpt from Treharne's August 7 declaration reads as follows: "I am the inventor of eight United States Patents involving electronic security features for Ford Motor Company. All are being, or have been, used in production and are: Patent No. 5,416,471: Method and Apparatus for Programing a Spare Key into a Security System: Patent No. 5,508,694: Method and Apparatus for Programming a Spare key into a Security System: Patent No. 5,539,260: Method and Apparatus for an Automotive Security System which Permits Engine Running Prior to Code Comparison: Patent No. 5,637,929: Method and Apparatus for Enhanced Vehicle Protection: Patent No. 5,684,339: Method and Apparatus for Enhanced Vehicle Protection: Patent No. 5,696,485: Method for Charging a Transponder: Patent No. 5,703,413: Method and Apparatus for Operating a Vehicle Security System Including Code Comparison after Starting which Counts Start Attempts: and Patent No. 5,790,014: Charging a Transponder in a Security System." (RA 465-466.)

This is hardly a substitute for the actual production of Patent No. 5,703,413, as Emily's request for production required.

[18] Ford didn't even produce the smoking gun patent at Treharne's deposition, although the deposition notice was accompanied by a subpoena requiring him to produce all documents "relating to" "the design process for the SecuriLock system" and "Ford's response" to any "problems or complaints with regard to the SecuriLock system." (AA 1215.)

b. Contrary to Ford's contentions, Emily's discovery requests covered patents relating to SecuriLock's design.

Ford claims that Emily's discovery requests did not cover the patents related to SecuriLock. (RB 36.) Not true. In her Request for Production Of Documents, dated August 19, 1999, Emily asked for the following:

- Any and all documents *referring or relating* to the design of the SecuriLock system. (AA 1209-1210, emphasis added.)
- Any and all documents *referring or relating* to the development and/or testing of the SecuriLock system. (AA 1209, emphasis added.)
- Any and all documents *referring or relating* to . . . malfunctions of the SecuriLock system. (*Ibid.*, emphasis added.)

These requests plainly cover *all* documents, including patents, relating to the design, development, testing or malfunction of SecuriLock. The request necessarily encompassed a patent that expressly admitted SecuriLock did not properly function and needed to be fixed. Ford had an obligation to produce all responsive documents in a timely manner, including the crucially-important and damning Patent No. 5,703,413. Ford

failed to meet this obligation. By doing so, it prevented Emily from using the damning document in opposition to summary judgment.

c. Emily wasn't required to "object" to Ford's March 7, 2000 document production, as she had no way of knowing Ford secretly was holding back a crucial document.

Ford claims that because Emily did not object to its March 7, 2000 document production (where Ford produced 1,700 documents), she somehow agreed that such production was sufficient. (RB 9.) But how could Emily possibly have known that Ford was holding back a critical document showing that it knew SecuriLock didn't work and that it needed to patent a fix? At that point, Emily properly assumed that Ford's production was consistent with its statutory obligation to produce "all" relevant documents—that "all" really meant "all."

Absolutely nothing can be read into Emily's failure to object to the document production on March 7, 2000. Emily was entitled to rely on Ford's representation that it had produced all responsive documents. She should not be penalized for the consequences of Ford's deceit.

3. Ford's Belated "Production" Of A Document That Admitted SecuriLock Was Defective And That Purported At The Last Moment To Change Its Theory Of Defense Required The Trial Court To Grant Emily's Motion To Reopen Discovery.

The belated, last-minute production of the damning Patent No. 5,703,413 marked a major shift in Ford's theory of non-liability. Prior to this time, Ford contended SecuriLock worked—that it was not defective and that it could not be overcome. (See, e.g., AA 302 ["the SecuriLock system did in fact work as represented and advertised"].)

Then, in its reply papers in support of its summary judgment motion, Ford admitted for the first time that prior to 1998, SecuriLock-equipped cars could be hot-wired and needed a fix. (AOB 35-36.) Yet Ford insisted that this problem was eliminated in Emily's car because it contained the patented technology described in Patent No. 5,703,413. (*Ibid.*)

To say that this information was critical to Emily's case and her opposition to Ford's summary judgment motion is an understatement. Yet Ford hid this document. It was not contained in Ford's prior production of purportedly *all* documents responsive to Emily's discovery requests. It was not produced at Treharne's deposition pursuant to an all-inclusive deposition subpoena duces tecum. (See AA 1215.) It was not even

attached to Ford's reply papers when it first sprang the newly-conceived "fix" theory. (AA 1067, 1178 [patent was attached to Ford's "Supplemental Reply To Plaintiff's Supplemental Opposition To Motion For Summary Judgment"].)

Emily was entitled to reopen discovery to explore Ford's newly articulated theory of defense. (See AOB 37-38.) "Good cause for a continuance may be established where a party has been surprised by unexpected testimony and requires a postponement to enable him to meet it." (*In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1169.) For instance, in *In re Marriage of Hoffmeister*, a wife filed financial statements in support of her motion to increase spousal support, after the husband had filed his opposition. On the hearing date, the husband moved for a continuance on the ground that he had received the new financial statement only three days earlier and had thus had inadequate time to respond to the newly-raised legal and factual issues. The trial judge denied the motion for continuance. The Court of Appeal reversed, holding that to the extent new factual and legal issues were raised by the wife's papers, the husband was entitled to advance notice. (*Id.* at pp. 1169-1171 [denial of continuance deprived husband of opportunity to meet new evidence and denied him fair trial].)

The present case is analogous. When Ford's reply referred for the first time to a document that should have been disclosed six months earlier

and, in doing so, changed Ford's theory of non-liability, Emily needed time to examine the document, to conduct discovery to procure evidence relevant to the new disclosures in the document, and to negate Ford's new theory. Indeed, Ford's advancement of a new theory is exactly the sort of "change in the status of the case" that makes a case "not ready for trial." (*Cal. Stds. Jud. Admin.*, section 9 ["the court should consider all matters relevant to a proper determination of the motion [for continuance], including . . . whether the interests of justice are best served by a continuance"; good cause for continuance exists where there is a "change in status of the case" that makes it "not ready for trial"].)

When the trial court denied Emily's requested continuance, it deprived Emily of the opportunity to meet Ford's new evidence and effectively denied her a fair hearing on the summary judgment motion. Such a denial is reversible error. (See *Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 494 ["The denial of a continuance which has the practical effect of denying the applicant a fair hearing is often held reversible error"].)

C. Emily's Motion For Reconsideration Should Have Been Granted.

By her motion for reconsideration, Emily asked the trial court to reconsider its order granting summary judgment, based on her expert's

successful hot-wiring of a 1998 Explorer, the model identical to Emily's and supposedly bearing the fixed SecuriLock. (AA 1337-1344.)

Ford argues that Emily's motion for reconsideration didn't meet the standards articulated in Code of Civil Procedure section 1008 because she didn't "provide any new evidence or a satisfactory explanation why she failed to produce this 'new' evidence at an earlier date." (RB 29.) Ford is wrong.

Despite her all-inclusive discovery requests (see section II.B.2.b), Emily did not learn of the existence of Patent No. 5,703,413 until September 1, 2000 and did not receive the patent until September 29, 2000. (AA 800-801, 1178, 1202.) This new evidence was crucial because it contained Ford's admission that SecuriLock could be circumvented and provided a basis for Ford's newly-coined defense that the problem was purportedly cured on 1998 model year cars (such as Emily's).

Until Emily learned of Ford's position that prior defects in SecuriLock had purportedly been "fixed" on her car, she had no reason to try to disprove Ford's "fix" theory; there was no reason to prove that the SecuriLock system on 1998 models had *not* been fixed because that contention had never previously been advanced.

When Emily learned that Ford now claimed that the SecuriLock problems were fixed on her model, it was necessary—for the first time—to try to rebut that new claim. So Emily asked her expert to demonstrate that

the SecuriLock system on 1998 Explorers had not been fixed. At that point, Emily no longer had her vehicle, as her lease had expired in November 1999 and her car had been turned in. (RT E-2.)[19] That presented a problem. Where was Emily going to find a 1998 Explorer on which to test the "fix" theory?

After searching for a comparable 1998 car, Emily found one and had it tested by Painter. (AA 1354-1355.) Painter easily hot-wired the 1998 Explorer, conclusively disproving Ford's new theory of non-liability. (See p. 60, *supra*; AOB 39.)

The trial court denied Emily's motion for reconsideration of this newly-discovered evidence. The court dismissed a potentially meritorious cause of action. (See AOB 40-41.) It abused its discretion.

Ford's late "production" of the patent—which was required to be turned over six months earlier—and advancement of a new theory necessitated that the trial court reopen discovery. Having failed to do that, the trial court had an obligation to reconsider its summary judgment ruling since Painter's ability to defeat the supposedly-fixed SecuriLock demonstrated conclusively that the summary judgment ruling was based on a false premise. Indeed, the trial court issued summary judgment on the ground it that "there is inadequate evidence to establish a triable issue of

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[19] So she could not, as Ford flippantly suggests, have experimented on her own vehicle. (RT E-2.)

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 1423.) Emily's new evidence affirmatively demonstrated that the summary judgment ruling was wrong on its face.

Ford argues that Emily's expert did not demonstrate a successful bypass of SecuriLock. (RB 29.) Watch the videotape. It shows Mr. Painter electrically bypassing the system with a small piece of wire in just two minutes. (See AA 1449.) Ford can try to debunk this evidence at trial; it can proffer to a jury its alternative explanation for how the SecuriLock system was so easily circumvented. (See RB 29 [citing RA 1474 (Ford's expert's explanation)].) But it cannot do so on summary judgment.

The trial court erred in denying Emily's motion for reconsideration.

CONCLUSION

This case must be allowed to proceed to trial.

Ford has falsely represented to millions of consumers that "without the specially-coded key, your [SecuriLock-equipped] car *won't start.*" Ford has been caught in its falsehoods.

As the Supreme Court recently noted, when a corporation makes "factual representations about its own products . . . , it must speak

truthfully." (*Kasky, supra*, 27 Cal.4th at p. 946.) Ford has not spoken truthfully.

Emily has presented ample evidence that Ford has defrauded her and the American public. Emily has pleaded viable causes of action. Emily should be allowed to take her case forward to vindicate the rights of consumers to stop the lies and to hold Ford to its legal obligations.

The Court should reverse the judgment, reinstate the causes of action eliminated on demurrer and on summary judgment, and permit this meritorious lawsuit to advance to trial.

DATED: August 30, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Rule 14(c)(1) for Appellant's Reply Brief, pertaining to Case No. B152446. I certify that:

x Pursuant to California Rules of Court Rule 14(c)(1), the attached Appellant's Reply Brief is

x Proportionately spaced, has a typeface of 13 points or more, and contains 13,819 words.

DATED: August 30, 2002

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