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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

NICASIO DAVID III, et al.,

Plaintiffs, Cross-defendants and  
Appellants,

v.

WINN AUTOMOTIVE, INC.,

Defendant and Respondent;

AMERICREDIT FINANCIAL  
SERVICES, INC.,

Defendant, Cross-complainant and  
Respondent.

A144272

(Alameda County  
Super. Ct. No. HG12615824)

Nicasio David III and Myra David purchased a used vehicle from Winn Automotive, Inc. (Winn) on credit. Their sales contract was assigned to AmeriCredit Financial Services, Inc. (AmeriCredit). The vehicle's engine failed about six months after purchase, and Winn refused to repair it. The Davids then brought this action against both Winn and AmeriCredit,<sup>1</sup> asserting claims for misrepresentation, violation of the Consumer Legal Remedies Act (Civ. Code,<sup>2</sup> § 1750 et seq.; CLRA), and breach of the implied warranty of merchantability in violation of the Song-Beverly Consumer Warranty Act (§ 1790 et seq.; Song-Beverly Act), among other things. AmeriCredit filed

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<sup>1</sup> Winn and AmeriCredit jointly filed a single appellate brief. We refer to them collectively as defendants.

<sup>2</sup> All statutory references are to the Civil Code unless otherwise indicated.

a cross-complaint, asserting the Davids had stopped making their finance payments. After the jury returned a special verdict, the court entered judgment in favor of defendants on all claims. On appeal, the Davids argue (1) substantial evidence does not support the trial court’s findings on the CLRA claim; (2) the trial court erred in not allowing the CLRA claim to go to the jury; and (3) the trial court erred in denying their motion to amend their complaint to conform to proof.<sup>3</sup> We affirm.

## I. BACKGROUND

### A. *Factual Background*

In October 2010, the Davids purchased a used 2008 Infiniti from Winn. The Davids signed a retail installment sale contract to buy the car on credit.<sup>4</sup> They made a \$4,000 down payment, and agreed to finance the remainder of the \$29,045.75 sales price at an annual percentage rate of 17.25 percent. Winn assigned the sales contract to AmeriCredit.

When Mr. David saw the Infiniti in Winn’s showroom, he noticed a buyer’s guide sticker in the window. The guide had the word “WARRANTY” in a large font with a check mark next to it.<sup>5</sup> In smaller print, the sticker stated: “MANUFACTURER’S WARRANTY STILL APPLIES [¶] The manufacturer’s original warranty has not expired on the vehicle. Consult the manufacturer’s warranty booklet for details as to warranty coverage, service location, etc. [¶] The dealership itself assumes no responsibility for any repairs, regardless of any oral statements about the vehicle. All warranty coverage comes from the unexpired manufacturer’s warranty.”

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<sup>3</sup> The Davids’ arguments relate to the claims they brought against Winn. On reply, they also argue the judgment in favor of AmeriCredit should be reversed if the judgment in favor of Winn is set aside. As we affirm the judgment in favor of Winn, we need not reach the issue.

<sup>4</sup> According to the sales contract, the odometer showed the vehicle had 32,211 miles at the time of sale.

<sup>5</sup> There was also an unchecked check box, with the words “AS IS—NO WARRANTY” next to it.

At trial, Mr. David claimed Winn's salesperson, Alan Le, told him the Infiniti was "a nice car" and was in "good condition." During the sale, Mr. David was presented with a "VEHICLE PRIOR HISTORY DISCLOSURE" form, which represented the Infiniti was a "Previous Rental Vehicle." At trial, Mr. David testified he initially hesitated, but signed the form when Winn's finance manager, Raquel Riley, told him "they do regular services for their vehicles."<sup>6</sup> Riley testified she had no recollection of Mr. David. When asked if she had ever represented to a customer that "rental car companies do good maintenance or maintain their cars well," Riley responded: "From time to time[,] clients ask [']is the vehicle in good condition.['] The answer is always [']all the safety items have been done on the vehicle.['] [¶] . . . [¶] That's it."

The Davids used the Infiniti for about six months without experiencing any problems. During this period, the Davids drove the vehicle about 12,000 miles and changed the oil twice. In or around April 2011, the car would not start. The Davids had the car towed to the Peninsula Infiniti dealership in Redwood City. The dealership determined there was a build-up of "sludge" in the engine, and the engine need to be replaced. The manufacturer voided the warranty because it determined the sludge accumulation was due to improper maintenance.

Mr. David then had the vehicle towed to Winn, which also refused to replace the engine. The Davids left the Infiniti at Winn's for about a month, and then had the car towed to their home. The car has remained in the Davids' garage ever since and is no longer operable. The Davids did not purchase a replacement vehicle, though they have rented a car from time to time.

### **B. Procedural History**

The Davids filed this action against Winn and AmeriCredit in February 2012. In their second amended complaint, they asserted causes of action for violation of the CLRA

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<sup>6</sup> In an earlier deposition, Mr. David testified he did not recall anybody at the dealership telling him about the maintenance of the car. He also testified that, other than Le's statement that the Infiniti was a "nice car," he could not recall anyone telling him "anything else about the quality, the condition, anything like that about the car."

(§ 1770 et seq.), violation of the Automobile Sales Finance Act (§ 2981 et seq.), intentional misrepresentation, breach of the implied warranty of merchantability under the Song-Beverly Act (§ 1790 et seq.), negligent misrepresentation, and declaratory relief. AmeriCredit filed a cross-complaint, alleging the Davids failed to make payments on their sales contract and asserting claims for breach of contract, money had and received, claim and delivery, and declaratory relief.

The trial court denied the Davids' motion for summary judgment, and the case proceeded to trial. Following the Davids' opening statement, defendants moved for nonsuit. The motion was denied. The Davids called several witnesses on October 27, and 28, 2014. After they rested their case on October 28, the Davids moved to amend their complaint to conform to proof by adding a cause of action for breach of the implied warranty of merchantability under the Uniform Commercial Code (UCC). At the same time, defendants renewed their motions for nonsuit. The trial court denied the motion to amend and took the nonsuit motions under submission. On October 29, 2014, the trial court granted the motions for nonsuit as to the Davids' claim for breach of the implied warranty under the Song-Beverly Act.

Throughout the trial, the court discussed the parties' proposed jury instructions with counsel and repeatedly expressed dissatisfaction with the instructions the Davids had drafted for their CLRA claim. After the close of evidence, the court found the Davids had failed to modify the CLRA instructions in accordance with its previous guidance. In order to avoid further delay, the court stated the jury would not be instructed on that claim. The court reserved the right to make its own findings on the CLRA claim.

The jury returned a special verdict finding Winn made a false representation of an important fact to the Davids, but Winn had reasonable grounds for believing the representation was true when made. The trial court then orally rejected the Davids' CLRA claim and directed entry of judgment. Judgment was entered on November 13, 2014. The court found in favor of defendants on all of the claims in the Davids' complaint, and in favor of AmeriCredit on its cross-complaint. The Davids moved for a

new trial, arguing the trial court erred in precluding them from proceeding to the jury on their CLRA claim. The motion was denied.

## II. DISCUSSION

### A. *Substantial Evidence Supports the Disposition of the CLRA Claim*

The Davids argue the trial court erred in finding for defendants on the CLRA claim. We disagree and find the trial court's ruling was supported by substantial evidence.

The Davids argue we should review de novo whether the trial court erred interpreting the CLRA. However, as set forth below, the resolution of the Davids' CLRA claim turns on various questions of fact, not on questions of law. The Davids appear to concede as much, as they argue their CLRA claim should have been submitted to the jury. Moreover, the Davids' briefing raises various factual issues and does not point to anything in the record suggesting how the trial court misinterpreted the CLRA. Because a statement of decision was neither requested nor issued, we must infer the trial court made all factual findings necessary to support the judgment on the CLRA claim. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) We will affirm the trial court's implied factual findings if they are supported by substantial evidence. (*Ibid.*)

The CLRA prohibits various unfair or deceptive acts or practices which result in the sale of goods to any consumer. (§ 1770, subd. (a).) Prohibited practices include “[r]epresenting that goods . . . have . . . characteristics . . . which they do not have”; “[r]epresenting that goods . . . are of a particular standard, quality, or grade”; and “[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.” (§ 1770, subd. (a)(5), (7), (14).) “ ‘Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.’ [Citation.] Accordingly, ‘plaintiffs in a CLRA action [must] show not only that a defendant’s conduct was deceptive but that the deception caused them harm.’ ” (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 809, disapproved on other grounds in *Kwikset Corp. v. Superior*

*Court* (2011) 51 Cal.4th 310.) “[P]laintiffs asserting CLRA claims sounding in fraud must establish that they actually relied on the relevant representations or omissions,” that is “ “ “without the misrepresentation, the plaintiff would not have acted as he did.’ ” ’ ” (Buckland, at p. 810.)

The Davids’ CLRA claim is predicated on three representations made by Winn’s employees. First, the Davids assert Raquel Riley, Winn’s finance manager, misrepresented that rental car companies perform regular service on their cars, and thus also misrepresented that the Infiniti, a prior rental, was well maintained.<sup>7</sup> But Mr. David’s testimony on this point was contradicted. While Riley could not recall Mr. David, she testified it was her policy not to comment on the condition of a car. Specifically, she stated that, when asked by a customer whether a vehicle was in good condition, her response was always “all the safety items have been done on the vehicle. [¶] . . . [¶] That’s it.”<sup>8</sup> Mr. David also offered contradictory testimony concerning Riley’s representations. In an earlier deposition, Mr. David stated he could not recall *anyone* at Winn telling him “anything” about the “quality,” “condition,” or “maintenance” of the vehicle other than that it was “a nice car.” Based on this evidence, the trial court could have reasonably concluded Winn did not make any representations concerning the rental car company’s maintenance of the Infiniti.<sup>9</sup> Moreover, as the trial court found, even if

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<sup>7</sup> The Davids also appear to argue Winn falsely represented the Infiniti was once a rental. However, they point to no evidence suggesting this representation was false.

<sup>8</sup> The Davids contend Riley’s customary response is irrelevant because “Mr. David never testified he queried about the Infiniti’s condition.” But we are not required to accept the Davids’ version of events merely because Mr. David was silent about whether Riley’s purported misrepresentation was made in response to a query. To the contrary, on substantial evidence review, we must view the record in the light most favorable to the findings of the trial court. (*Bobys v. Mester* (1951) 102 Cal.App.2d 583, 585.)

<sup>9</sup> In its special verdict, the jury found Winn made “a false representation of an important fact to the Davids.” However, it is unclear what that false representation was or if it encompassed Riley’s purported statement regarding the maintenance of the car or any of the other representations the Davids discuss on appeal.

the representation was made, it does not indicate *all* rental cars are properly serviced or that this particular rental car was properly serviced.

The Davids contend we may not infer the trial court found Riley did not make any representations concerning the rental company's maintenance of the Infiniti. When discussing that statement, the trial court said: "On that particular ground I did not hear . . . any real testimony as to that particular representation." The Davids assert that, since the trial court admitted it did not hear testimony on this representation, "it would have been impossible for the court to write in a statement of decision whether the representation was made, or not." However, the trial court's statement could be interpreted to mean it did not hear sufficient testimony to support such a finding. In any event, absent a statement of decision, we need not review the trial court's reasoning. The court's judgment "is measured by its terms and not by any reasons the court may give for it. [Citations.] It is recognized that 'the reasons given by the court for its action may be bad, and the decision, at the same time, correct for other reasons. It is the action of the court that is presumed to be correct and this presumption obtains even though the reasons given may be bad.' [Citations.] The reasons stated may be valuable in illustrating the trial judge's theory but they are not binding on an appellate court [citation] and they may never be used to impeach the order or judgment." (*Yarrow v. State of California* (1960) 53 Cal.2d 427, 437-438.)

The second purported misrepresentation on which the Davids' CLRA claim is based is that the manufacturer's warranty still applied to the Infiniti. It is undisputed the statement appeared on a "buyers guide" affixed to the vehicle. The buyer's guide also stated: "The manufacturer's original warranty has not expired on the vehicle. Consult the manufacturer's warranty booklet for details as to warranty coverage, service location, etc." The Davids now argue "the only reasonable interpretation" of the buyer's guide is any major problem occurring within the warranty period would be covered by the manufacturer's warranty. The contention is unavailing. The guide did not make any representations about the manufacturer's warranty other than that it had not yet expired—an accurate statement. Nor did the guide make any assurances about the scope of

warranty coverage. The Davids argue the buyer's guide was inaccurate, "because the manufacturer's warranty would never cover any engine defect that was sludge related, or could be blamed on a lack of maintenance." But the buyer's guide does not represent such problems are covered by the warranty. Moreover, it would be unreasonable to interpret the buyer's guide to mean the manufacturer's warranty contained absolutely no exclusions. The Davids assert we must liberally construe the CLRA. But this rule of construction applies to the statute, not to a defendant's statements. In any event, even a broad reading of the buyer's guide does not support the Davids' theory.

Third, the Davids argue they should prevail on their CLRA claim because Alan Le, Winn's salesman, represented the Infiniti was in "good condition." However, as discussed above, there was contradictory evidence as to whether Le, or anyone else at Winn, made representations concerning the condition of the car. Mr. David was the only person to testify at trial concerning this particular representation. Yet, in an earlier deposition, Mr. David could not recall having been told anything about the condition of the vehicle. Thus, the trial court could have reasonably concluded Mr. David's trial testimony on this issue was not credible. It could have also concluded a representation the car was in "good condition" constituted a statement of opinion, and was therefore inactionable. (See *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111–113 [some representations concerning the quality of a product express a seller's subjective opinion and cannot be relied upon as statements of fact].) Contrary to the Davids' assertions, this is a finding of fact, which is entitled to deference on appeal. (See *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1081.)

***B. The Davids Forfeited the Right to Have the Jury Decide the CLRA Claim***

Alternatively, the Davids assert the trial court erred in not allowing the CLRA theory of recovery to go to the jury. We disagree. The Davids forfeited their right to a jury trial on their CLRA claim when they failed to propose correct instructions on that claim.

"A party is entitled to have the jury instructed on each viable legal theory supported by substantial evidence if the party requests a proper instruction." (*Orichian v.*

*BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333.) In this case, there is no dispute the Davids presented sufficient evidence to go to the jury on their CLRA claim. Rather, the only disputed issues appear to be whether the Davids' proposed CLRA instructions correctly stated the law and whether the trial court erred in refusing to postpone the case in order to give the Davids time to redraft those instructions. To the extent this dispute turns on legal questions concerning the validity of the Davids' proposed instructions, our review is de novo. To the extent it turns on questions of time management at trial, we review the trial court's ruling for an abuse of discretion. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613 [whether instruction should have been refused because offered too late, rested within the discretion of the trial court].)

We conclude the trial court did not err in declining to instruct the jury on the CLRA claim. "It is the responsibility of counsel to propose correct instructions." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.) "A court may refuse a proposed instruction that is erroneous, misleading, or otherwise improper and ordinarily has no duty to modify a proposed instruction in a civil case. [Citations.] This general rule is inapplicable, however, if the inaccuracy is minor and easy to correct and the failure to do so would leave the jury inadequately instructed on an important issue." (*Orichian v. BMW of North America, LLC, supra*, 226 Cal.App.4th at p. 1333.) "Certainly if the defect can be cured with a word or two the change should be made by the trial judge in order to state the vital controlling principles . . . . [Citation.] On the other hand, . . . '[t]here is neither reason nor justification for compelling a trial judge to act as a sort of advisory or "backup" counsel . . . .' " (*Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1114.) Here, the Davids' proposed CLRA instructions were incorrect and misleading. Moreover, the Davids were provided an opportunity to correct those instructions, yet failed to do so.

The Davids did not provide the trial court with their proposed CLRA instructions until the afternoon of October 27, 2014, the first day of trial.<sup>10</sup> Two of the proposed special instructions, Nos. 4 and 7.1, were substantively identical. Both copy language from section 1770, subdivision (a), which provides a list of practices proscribed by the CLRA. Special instruction No. 7.1, which is entitled “Burden of Proof Consumer Legal Remedies Act,” states that, “[t]o succeed” on their claim, CLRA plaintiffs need only prove the defendant engaged in one of these proscribed practices. Neither special instruction No. 7.1, nor any of the other special instructions offered by the Davids, discuss the two other elements of a CLRA claim: reliance and damages. (See *Buckland v. Threshold Enterprises, Ltd.*, *supra*, 155 Cal.App.4th at pp. 809–810 [CLRA actions may be brought only by a consumer who suffers damage; lack of actual reliance defeats a CLRA claim sounding in fraud].)<sup>11</sup> Accordingly, the instructions are a misstatement of the law, and they would have misled the jury. Even though defendants objected to the instructions on the grounds they did not include any discussion of justifiable reliance or harm, the Davids never corrected them or submitted revised instructions to the trial court.

The Davids now argue they were entitled to have the jury instructed on all their claims for relief, including their CLRA claim. But the trial court was not required to instruct on a claim for which the Davids submitted an improper instruction. (*Orichian v. BMW of North America, LLC*, *supra*, 226 Cal.App.4th at p. 1333.) Further, relying on *Ng v. Hudson* (1977) 75 Cal.App.3d 250, the Davids argue any errors in their instructions

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<sup>10</sup> The Davids failed to submit their CLRA instructions before the first witness was sworn in violation of Code of Civil Procedure section 607a. The Davids’ counsel later claimed he attempted to file proposed CLRA instructions on October 7, and then again on October 20, but the clerk refused to accept those instructions because they were not labeled as “ ‘Joint.’ ”

<sup>11</sup> (See also *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1386–1387 [under the CLRA, a misrepresentation is material for a plaintiff only if there is reliance]; *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [“Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm.”]; *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 980 [“The trial court correctly ruled that actual reliance must be established for an award of damages under the CLRA.”].)

were easily correctible, and thus the trial court should have revised them itself. *Ng* is inapposite. In that case, the court held it was error to refuse a request to give a BAJI instruction merely because that request was made orally. (*Ng*, at pp. 256–257.) The court reasoned the oral request could have caused no more than “trivial inconvenience,” as loose sheet forms of the BAJI instructions were available to the trial judge. (*Id.* at p. 257.) Moreover, any error was “easily correctable.” (*Ibid.*) Had the trial judge informed the plaintiff the request was unacceptable, the plaintiff could have easily produced a typewritten copy. (*Ibid.*) In contrast, here, the problem with the Davids’ proposed instruction was not the form in which it was requested. Nor was this a case where the defect could be “cured with a word or two.” (*Wank v. Richman & Garrett, supra*, 165 Cal.App.3d at p. 1114.)

The Davids further argue any deficiency in their proposed instructions was cured by their proposed verdict form, which would have asked the jury to determine whether the Davids “suffer[ed] harm as a result of the representation.” Setting aside that neither the proposed verdict nor the proposed CLRA instruction make mention of reliance, an essential element of a CLRA claim, the Davids cannot use their verdict form to correct a clear misstatement of the law in their proposed jury instructions. The language the Davids quote from *Spear v. Leuenberger* (1941) 44 Cal.App.2d 236, does not hold otherwise. That case merely holds a reviewing court must consider all instructions as whole when evaluating whether the instructions *given* misstated the law. (*Id.* at p. 251.) Nor does the fact the jury instructions on negligent misrepresentation included a definition of reliance cure the defect in the Davids’ proposed CLRA instructions. It is unreasonable to assume the jury would have known reliance was an element of a CLRA claim merely because reliance was mentioned in the instruction for a completely different claim.

Finally, the Davids argue that, to the extent their jury instructions were incorrect, the trial court should have conferred with the parties to determine the appropriate language and modified the jury instructions accordingly. But the court did confer with the parties on October 28. During this discussion, the Davids’ counsel maintained the

Dauids need only prove defendants made a false representation to prevail on the CLRA claim. Speaking about special instruction No. 4, the trial court said: “My inclination if it can fit into a present CACI of misrepresentation, that is where I think we should go. But I’ll take a look at this. [¶] You better mock something up under misrepresentation . . . . I am really unhappy that it is down to the last minute again after I asked for these earlier in the case. [¶] We’re going to move on tomorrow. . . . So if I don’t have an instruction that meets these specifications, I am not giving it. I am just warning you now.” Later, the court stated it would not give special instruction No. 7.1 because it was misleading. The court continued: “Now, I’m not going to give this [instruction]. I told you guys you can work on that other one. I will give something that, hopefully, maybe you guys can agree on.” When the court asked about special instruction No. 4 on the following day, the last day of trial, the Davids’ counsel stated: “I’m sorry, your honor. I didn’t understand I was supposed to rewrite it.” In order to avoid any further delay, the trial court decided to proceed without instructing the jury on the CLRA claim.

We concede the trial court’s directions on the CLRA instructions were not the model of clarity. At one point, the trial court indicated the parties should modify the instruction themselves. At another point, the court stated it would “give something that, hopefully, [the parties] can agree on,” suggesting the court would redraft the instruction itself. Moreover, it appears the trial court did not expressly rule on whether reliance and damages were elements of the CLRA claim.<sup>12</sup> However, we cannot ignore the Davids’ failure to submit an adequate CLRA instruction to the trial court. Reversal might have been warranted if the Davids proposed a CLRA instruction which set forth a correct statement of the law, and the trial court refused to give it. But that is not what happened. The Davids’ proposed instruction merely parroted certain statutory language and omitted two of the three elements of a CLRA claim. In short, it was incorrect and misleading. Defendants’ objections should have put the Davids on notice of the deficiencies in their

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<sup>12</sup> On the proposed verdict form submitted by the Davids, the court wrote: “No mention of reasonable reliance.” It is unclear when and how this was conveyed to the parties.

proposed instructions. Nevertheless, the Davids continued to insist their instructions were correct and failed to submit revisions, despite being given an opportunity by the court. Because the Davids did not request a proper CLRA instruction, they cannot now complain about the trial court's failure to instruct on their CLRA claim. (*Hyatt v. Sierra Boat Co.*, *supra*, 79 Cal.App.3d at p. 335.)

### ***C. Denial of the Motion to Amend Was Not an Abuse of Discretion***

Next, the Davids argue the trial court erred in denying their motion to amend their pleading to conform to proof so as to include a UCC claim for breach of the implied warranty of merchantability. The motion was made orally on October 28, 2014, the penultimate day of trial. In denying the motion, the trial court found the Davids could have moved to amend earlier, noting the Davids had alluded to the UCC in their pretrial briefing. The court also stated: “[I]t looks as though . . . you are waiting until the end of your testimony, and then all of a sudden you are asking for a cause of action which [the] parties may not have been prepared to address.” We conclude the trial court did not abuse its discretion in denying the Davids’ motion.

The Davids concede an order denying a motion for leave to amend is generally reviewed for an abuse of discretion, but they argue we should independently review the order in this case because the trial court failed to apply the correct legal criteria. They point out the trial court cited both *Lavelly v. Nonemaker* (1931) 212 Cal. 380 and *Earp v. Nobmann* (1981) 122 Cal.App.3d 270 in ruling on their motion, and they contend those cases are inapposite. The argument is unavailing. While *Lavelly* and *Earp* may be factually distinguishable, the trial court merely cited them for the unremarkable proposition that a court should not permit amendments raising new issues and requiring cases be reopened for further evidence without a strong showing the requesting party was diligent and the amendment is justified under the circumstances. The Davids do not even attempt to argue this an incorrect statement of the law. Accordingly, we shall only reverse the order denying the motion to amend if the trial court abused its discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

“The cases on amending pleadings during trial suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory—for example, an easement as opposed to a fee—no prejudice can result.” (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.) “The basic rule applicable to amendments to conform to proof is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded.” (*Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400–401.)

The Davids argue they did not need to allege any new facts to support their proposed UCC claim for breach of the implied warranty of merchantability because they had already alleged a claim for breach of the implied warranty under the Song-Beverly Act. They further argue it is immaterial that their pleading mentions the Song-Beverly Act. According to the Davids, “Breach of implied warranty is breach of implied warranty,” regardless of whether it is brought under the Song-Beverly Act or the UCC.

But there are differences between the UCC’s and Song-Beverly Act’s requirements for prevailing on a claim for breach of the implied warranty. The UCC requires a buyer to notify the seller of a breach within a reasonable time after discovery (U. Com. Code, § 2607, subd. (3)(A)), while the Song-Beverly Act does not (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1307). “The notification which saves the buyer’s rights under [the UCC] need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.” (U. Com. Code com., 23A pt. 1 West’s Ann. Com. Code (2002 ed.) foll. § 2607, p. 546, com. No. 4.) The Davids argue no new evidence was required to prove they provided timely notice of breach because the parties stipulated the Davids sent Winn written notice of rescission on February 3, 2012. However, there is a

distinction between a notice of rescission and notice of breach, and since the stipulation did not disclose the contents of the Davids' notice we cannot discern whether it sufficed as the type of notice required by the UCC. Moreover, since the notice was sent about nine months after the Infiniti broke down, it is debatable whether the notice was timely. We disagree with the Davids' contention that this issue was "simply a matter for Winn to argue in closing." The timeliness of notice is a factual matter. "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." (U. Com. Code, § 1205, subd. (a).) Accordingly, defendants should have had an opportunity to further develop the record on this issue.

Additionally, as the trial court found, defendants may not have been prepared to address a claim for breach of the implied warranty of merchantability under the UCC. Their defense to the Davids' Song-Beverly Act claim was that the Act only provided for an implied warranty of merchantability for used goods when those goods were sold with an express warranty. The defense had merit (§§ 1791, subd. (a), 1791.1, 1795.5; *Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 407), and on the last day of trial the court granted defendants' motion for nonsuit on that ground. This defense would not have applied against the Davids' proposed UCC claim, since the UCC makes no distinction between new and used goods for the purposes of the implied warranty of merchantability. (See U. Com. Code, § 2314.) We concede defendants could have presented additional defenses, which would have applied to both a Song-Beverly Act claim and a UCC claim for breach of the implied warranty. For example, defendants could have asserted Winn conspicuously disclaimed the implied warranty of merchantability.<sup>13, 14</sup> However, in light of the Song-Beverly Act's limited application to

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<sup>13</sup> Under the Song-Beverly Act, the implied warranty of merchantability may not be disclaimed, "except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis." (§ 1792.3.) Even then, the implied warranty may not be waived "unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following: [¶] (1) The goods are being sold on an 'as is' or 'with all faults' basis. [¶] (2) The entire risk as to the quality and performance of the goods is with the buyer. [¶] (3) Should the goods prove defective

used goods, they did not need to do so. And since the Davids did not move to amend until the penultimate day of trial, defendants could not have predicted such additional defenses would be necessary. Accordingly, the trial court did not abuse its discretion in finding a last-minute amendment to add a UCC claim would have prejudiced defendants.

The authority on which the Davids rely is also inapposite. *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, did not involve a motion to amend the pleadings. Nor does it otherwise discuss the prejudice that may flow from allowing a midtrial switch from a Song-Beverly Act theory to a UCC theory of the implied warranty of merchantability. In *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, the court reversed an order denying a motion for leave to amend which had been filed *before* trial. (*Id.* at p. 759.) The Davids moved to amend on the second-to-last day of trial. Moreover, unlike here, the defendants in *Atkinson v. Elk Corp.* did not claim they would be prejudiced by the amendment. (*Id.* at p. 761.)

In sum, we cannot conclude the trial court abused its discretion in denying the motion to amend. In the alternative, the Davids ask that we find they prevailed on a UCC claim for breach of the implied warranty of merchantability as a matter of law. We decline to do so. As discussed above, defendants did not have a full opportunity to develop the record on this claim as it was not properly raised. In any event, a reasonable

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following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.” (§ 1792.4, subd. (a).) The UCC criteria for disclaiming the implied warranty are similar but less stringent. The disclaimer language “must mention merchantability and in case of a writing must be conspicuous.” (U. Com. Code, § 2316, subd. (2).) Alternatively, “[u]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.” (*Id.*, subd. (3)(a).)

<sup>14</sup> The Davids assert defendants did not need to present any new evidence to prove Winn disclaimed the implied warranty because the buyer’s guide, which purportedly contained the disclaimer, had already been admitted into evidence. But in addition to introducing the guide, defendants could have questioned witnesses about their understanding of it.

jury could have found the implied warranty was disclaimed by the buyer's guide, in which Winn expressly stated it assumed no responsibility for any repairs and all warranty coverage came from the unexpired manufacturer's warranty.

**III. DISPOSITION**

The judgment is affirmed. The parties shall bear their own costs on appeal.

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.