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

AARON REVIOUS et al.,

Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,

Defendant and Respondent.

F062211

(Super. Ct. No. 08C0703)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Law Office of John Derrick and John Derrick for Plaintiffs and Appellants.

Snell & Wilmer, Mary-Christine Sungaila and Matt Bennett; Law Offices of Kevin J. Tully and Kevin J. Tully for Defendant and Respondent.

Plaintiffs Aaron and Cobi Revious experienced recurring engine problems with their Ford F-250 truck and, in December 2008, filed a lawsuit against defendant Ford Motor Company under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.; Song-Beverly Act). In accordance with its written warranty, defendant or its authorized repair facility made a number of attempts to correct the engine problems during the warranty period. Repairs performed in March 2009 were apparently effective, and no further repairs under the warranty were requested by plaintiffs even though the five-year warranty continued until December 2009. In March 2010, a diagnostic test conducted by defendant's expert confirmed the truck was working fine at that time. However, according to plaintiffs, the engine was not permanently fixed. A diagnostic test performed by plaintiffs' expert in November 2010, shortly before trial, indicated the truck was manifesting engine problems again. During in limine proceedings, defendant moved to exclude the introduction of evidence relating to the November 2010 diagnostic test under Evidence Code section 352.¹ The trial court granted the motion, concluding that the risk of prejudice was substantial while the relevance of the evidence was tenuous at best. Additionally, when plaintiffs attempted to testify of engine symptoms that were continuing at the time of trial, the trial court sustained defendant's objections. Based on the evidence before it, the jury found that defendant or its authorized repair facility had successfully repaired the vehicle to match defendant's written warranty within a reasonable number of attempts, thereby defeating plaintiffs' Song-Beverly Act action. The trial court entered judgment in defendant's favor, and plaintiffs now appeal from that judgment on the ground that the trial court erred in excluding plaintiffs' postwarranty evidence of recurring engine problems. We conclude that plaintiffs have failed to

¹ Unless otherwise indicated, all further statutory references are to the Evidence Code.

demonstrate the trial court's evidentiary rulings were prejudicial and, therefore, we sustain the judgment.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs purchased a new Ford F-250 crew cab truck from a local Ford dealership in December 2004. The truck had a diesel engine, seating to accommodate plaintiffs' entire family, and was capable of towing recreational vehicles. The truck's diesel engine came with a five year or 100,000 mile warranty.

Summary of Engine Problems and Repairs

In the first three years that plaintiffs owned the truck, they took it to a Ford dealership for repairs of various problems under the warranty, including an oil pressure leak, check engine light illuminating, a surge or jerk upon climbing hills, replacement of alternator and battery, replacement of head gaskets, coolant system problems and a lag in acceleration. Additionally, in March 2008, the truck lost all power while climbing a hill on the way back from a family trip to Las Vegas, and plaintiffs were forced to tow the truck home from Barstow. According to the Ford dealership, the source of the power loss was a faulty high-pressure oil pump that fed the fuel injectors.

Plaintiffs' truck began to experience serious cranking or starting difficulties in the fourth year of plaintiffs' ownership. During 2008, the truck was brought to the dealership several times for repairs when the check engine light was illuminating and/or when the truck would have difficulty starting or would not start at all. Twice in December 2008, the truck had to be towed into the repair facility because it would not start or because the engine would die after starting.

In March 2009, while plaintiffs were in Las Vegas, the truck once again would not start and plaintiffs had it towed to a Ford dealership in Nevada for repairs. At that point, the truck had 72,000 miles on it. The Ford dealership replaced the wiring harness in the engine compartment. After this repair in March 2009, plaintiffs did not take the vehicle in for any further repairs under the warranty, even though the warranty remained in effect

until at least December 2009. This was because “the vehicle ha[d] somewhat been acting normal.”

Plaintiffs Assert Rights Under Song-Beverly Act

Shortly after the March 2008 incident in which the truck lost all power and broke down on the drive home from Las Vegas, plaintiff Aaron Revious contacted defendant’s customer hotline and asked defendant to replace the vehicle. He was told that the vehicle did not meet the criteria for a buyback at that time. On December 11, 2008, after a series of incidents that year in which the truck would not start or would die after starting, plaintiffs filed their complaint for violation of the Song-Beverly Act. According to the complaint, the “subject vehicle has suffered from nonconformity(s) to warranty, including, but not limited to, defect(s) to its engine which have manifested in the following recurrent concerns: oil leak, activation of the check engine light, surging, slow and/or no start, coolant leak, loss of power, and rough idle,” and said problems “have substantially impaired the vehicle’s use, value, or safety to Plaintiffs.” The complaint further alleged that plaintiffs had delivered the truck for repair to defendant or its authorized repair facilities and defendant or its authorized repair facilities “have failed to ... repair the subject vehicle to warranty after a reasonable number of attempts.” In their prayer for relief, plaintiffs requested restitution of their financial investment in the vehicle, along with other incidental damages and civil penalties.

Postwarranty Inspections

The five-year engine warranty expired on December 12, 2009. As noted above, the last repair performed under the warranty was in March 2009, after which the vehicle was, in plaintiff Aaron Revious’s words, “somewhat ... acting normal.” Although plaintiffs did not bring the truck in for any further repairs under the warranty following the March 2009 repair, plaintiffs testified they did not believe that the truck was permanently fixed, since problems had always recurred in the past. Also, plaintiffs

continued to notice some hesitations in engine acceleration, but the truck was functional and plaintiffs “basically just ... got fed up with dealing with all of it.”

In March 2010, approximately three months after expiration of the warranty period and 12,000 miles after the last repair in March 2009, defendant’s expert (a field service engineer) inspected the truck, with plaintiffs’ expert observing, and both experts agreed the truck drove normally and that no error codes showed up on the computer diagnostic test. Plaintiffs concede the vehicle was working fine on that day.

On November 11, 2010, shortly before trial, the subject truck was inspected by plaintiffs’ expert. At that time, plaintiffs had driven the truck another 9,000 miles since the time of the March 2010 inspection.² Plaintiffs’ expert ran a computer diagnostic test on the vehicle and reported there were error codes for lag on acceleration, check engine light and fuel injectors. One week later, plaintiffs’ expert was deposed concerning the test results.

Jury trial began on November 29, 2010.

Motions In Limine

Defendant’s Motion in Limine

During in limine proceedings, the trial court considered defendant’s motion to exclude evidence of the November 2010 inspection and diagnostic test under section 352.³ Defendant’s counsel argued that a need for service or repairs long after the warranty had expired would be of little if any relevance and would likely be prejudicial

² At the time of the last warranty repair in March 2009, the odometer reading on plaintiffs’ truck was 72,000 miles; by the time of defendant’s inspection in March 2010, the mileage was 84,000; and by the time of plaintiffs’ inspection in November 2010, the mileage was 93,000. Thus, from the time of the last repair under the warranty until the November 2010 diagnostic test, plaintiffs put approximately 21,000 miles on the vehicle.

³ The written motion in limine filed by defendant actually referred to the need to exclude postwarranty “repairs,” but in oral argument the parties focused on the November 2010 test results.

or confuse the jury, particularly when the March 2010 inspection showed the vehicle was functioning properly at that time. Plaintiffs' counsel responded that the November 2010 inspection and test results showed that the vehicle's core defects were never permanently repaired and thus problems continued to recur. Plaintiffs' theory was that the repairs amounted to a temporary "Band-Aid" which worked for a while, but then the symptoms would come back. The trial court agreed with defendant's position, ruling as follows: "[P]ursuant to ... section 352[,] the results of the examination by the plaintiff's expert o[f] the vehicle [i]n November of 2010 would be excluded under [section] 352.... [T]he relevance in the Court's opinion is substantially tenuous. The prejudice is overwhelming, the confusion of the jury and the additional time that it would take to explain these issues away require that the Court make [this] order."

Plaintiffs' Motion in Limine

One day after the trial court granted defendant's motion to exclude the results of the November 2010 examination of plaintiffs' truck, plaintiffs made a motion to exclude the March 2010 inspection and diagnostic test. Plaintiffs argued that if the November 2010 test/inspection had to be excluded under section 352 since it was outside the warranty period, the same should hold true of the March 2010 test/inspection. Defendant countered the March 2010 evidence was distinctly relevant because at that time the warranty period had only recently ended and there "could be some arguments the warranty extended beyond that."⁴ The trial court denied plaintiffs' motion. Although the trial court's explanation for its ruling is somewhat hard to follow, it is clear that the trial court distinguished the March 2010 test/inspection from the later (November) evidence.

⁴ Under Civil Code section 1793.1, subdivision (a)(2), every work order must state: "If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed." Also, postwarranty problems may indicate that the defect was never adequately repaired during the warranty period. (See Civ. Code, § 1793.2, subd. (d).)

The November 2010 evidence was excluded because it involved concerns about “prejudice to the defendant and the potential confusion of the jury” (i.e., § 352 considerations) as well as “timeliness” issues. In contrast, the trial court concluded the March 2010 test/inspection did not suffer from those concerns and was “relevant” because it shed light on the issue of whether the warranty was potentially extended (see fn. 3, *ante*).

As a result of the trial court’s rulings on the motions in limine, the jury was permitted to hear evidence relating to the test/inspection conducted by defendant’s expert in March 2010, but not the later test/inspection conducted by plaintiffs’ expert in November 2010.

Trial Testimony

Plaintiffs’ expert, Daniel Calef, testified that plaintiffs’ F-250 truck had never been properly repaired because “there [was] no indication that the root cause and the root problems were ever actually addressed,” and the same types of symptoms continued to recur. He explained that he was not surprised that there were no error codes during the March 2010 inspection of the truck: “One would reasonably expect the [vehicle] to work right[,] at least for awhile [after the wiring harness repair], and it is not surprising to me that ... you come and you do an inspection later on and right now the problems aren’t there, but as you look through the history [and] this [is] what happens is problems keep [recurring].” As an example of that pattern, he pointed out how, after the two alternator replacements, the truck started fine for a while but later the starting problem returned. Further, based on plaintiffs’ testimony about how the vehicle “[was] still acting up” in ways that “[were] consistent with its repair history,” Calef’s opinion was that the vehicle was currently in need of repair.

Defendant’s expert, James Reavill, testified based on his March 2010 diagnostic test, visual inspection and test drive of plaintiffs’ truck that the repairs had been successful; the truck was functioning properly and past warranty concerns had been

resolved. He found no indication of “belt squeal, lack of power or any previous warranty driveability concerns.” No error codes were present on the computer diagnostic test and the truck performed normally in a test drive. He reported that at the time of the March 2010 inspection, plaintiff Cobi Revious admitted that the vehicle “was running fine.” Reavill also testified that in comparison to a gasoline engine, a diesel truck ordinarily has a slight lag in acceleration after making a complete stop such as at a stop sign or traffic light, especially in the case of a six-liter diesel engine as here. His test drive showed the vehicle was functioning properly (including in regard to acceleration) and it performed comparably to other diesel trucks of this type.

At trial, plaintiffs individually testified to some extent regarding continuing problems with their truck, but the trial court also curtailed such testimony. Plaintiff Aaron Revious testified about a “[h]igh pitch squealing noise when the fan clutch engages when pulling a load,” which they were still experiencing “today,” at least intermittently. He also testified that “today” the truck continues to have “a significant lag on acceleration, typically from a stop sign.” In later testimony, he again referred to the hesitation or lag in acceleration and testified that he did not believe that the truck was permanently repaired. Plaintiffs’ counsel inquired further about current problems with the vehicle, at which point defense counsel objected—based in part on the “motions in limine”—and the trial court sustained the objection. Out of the presence of the jury, plaintiffs’ counsel asked the trial court to explain why it sustained the objection. The trial court agreed with plaintiffs’ counsel that plaintiffs’ testimony about the current condition of the vehicle that they themselves experienced was “relevant,” but the trial court did not want the plaintiffs to discuss the November 2010 inspection/test.⁵ On redirect, plaintiff

⁵ The trial court further stated: “[I]n my belief and my understanding of the law is that ... when does it necessarily become irrelevant when vehicles outside the warranty period continue to have difficulties, it is kind of a question of fact for the jury to decide, at least it is my understanding.” At the same time, the trial court acknowledged that

Aaron Revious was asked if there had ever been a time after the March 2009 repair that he did not have problems with the vehicle. He responded: “No, there seemed to be always a delay from a start or a lag that was noted early on,” which was most noticeable when “leaving a stop sign or a stoplight.”

When plaintiff Cobi Revious was asked to specify what problems she was currently experiencing with the truck, the trial court sustained defense counsel’s objection. It is difficult to harmonize this ruling with the trial court’s earlier clarification that such testimony would be relevant, particularly when no explanation is given as to why her testimony would be unduly prejudicial or misleading to the jury. Nonetheless, plaintiff Cobi Revious *was* permitted to testify that she did not believe the truck was permanently fixed, she did not trust the truck because of its engine problems, she and her husband would not take trips by themselves anymore due to concerns about its reliability, and they would not sell it because the person who bought it would be stuck with the same problems. Plaintiff Aaron Revious gave essentially the same testimony about how they have changed their present driving habits due to the unreliability of the vehicle.

Jury Verdict and Motion for New Trial

The jury’s special verdict form asked two key questions relating to whether plaintiffs successfully proved their Song-Beverly Act claim. The first question was: “Did the vehicle have a defect covered by the ... Warranty that substantially impaired the vehicle[’]s use, value or safety to a reasonable buyer in [plaintiffs’] situation.” The jury’s finding was “Yes.” The second question was as follows: “Did [defendant] or its authorized repair facility fail to repair the vehicle to match the written ... Warranty after a reasonable number of opportunities to do so?” The jury’s finding, in an 11-to-1 verdict,

when a section 352 objection was raised, it would still need to consider whether probative value was outweighed by substantial risk of undue prejudice.

was “No.” Based on the jury verdict, the trial court entered judgment in defendant’s favor.

Plaintiffs moved for a new trial, contending that the exclusion of expert testimony about the November 2010 inspection and of plaintiffs’ testimony about the current condition of the truck was erroneous, prejudicial and required a new trial. Defendant opposed the motion, arguing the trial court had correctly ruled and/or no reversible error was shown. The motion was denied by operation of law. Plaintiffs timely appealed from the judgment.

DISCUSSION

I. Standard of Review

Plaintiffs argue the trial court prejudicially erred in excluding evidence of the November 2010 test/inspection of the truck and in limiting plaintiffs’ testimony of continuing engine problems they experienced. The trial court’s rulings were based on section 352, which states: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” We review the trial court’s decision to exclude evidence under section 352 under the abuse of discretion standard. (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 168.) “Under this standard, the trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]” (*Ibid.*) The trial court’s discretion should be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of justice. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.)

II. The Trial Court Abused Its Discretion

Under section 352, a trial court has broad discretion to exclude otherwise relevant evidence where its probative value is substantially outweighed by the probability that its introduction will create a substantial danger of undue prejudice. (§ 352; *Thompson v. County of Los Angeles, supra*, 142 Cal.App.4th at p. 171.) In the present case, the trial court excluded the evidence of the November 2010 diagnostic test because, in the court's view, its relevance was "tenuous" while prejudice was "overwhelming." For similar reasons and/or to prevent testimony about the November 2010 diagnostic test, plaintiffs' testimony of their experience with continuing engine problems was curtailed in response to defendant's objections.

To properly evaluate whether the trial court's evidentiary rulings may have been an abuse of discretion, it is necessary to understand what is meant by "prejudice" under section 352. "Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008.) "The prejudice which ... section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) As one court helpfully summarized: "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy, supra*, at p. 1009.) In other words, evidence is unduly prejudicial where it has very little effect on the issues but uniquely tends to evoke an

emotional bias against one party and thus poses an intolerable risk to the fairness of the proceedings. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 45; *Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 11; *People v. Waidla* (2000) 22 Cal.4th 690, 724 [“Evidence is substantially more prejudicial than probative ... if, broadly stated, it poses an intolerable ‘risk to the fairness of the proceedings or the reliability of the outcome’”].)

Plaintiffs argue that the excluded evidence was relevant to the issue of whether or not the defect was ever repaired. We agree with plaintiffs that the evidence had *some* relevance on that issue, even though the remoteness in time may suggest its probative value would be relatively slight. Thus, the key question before us is whether introduction of this evidence could have resulted in undue prejudice within the meaning of section 352. Plaintiffs argue that there is nothing concerning a computer diagnostic test of a vehicle that would tend to be inflammatory or that would result in an emotional bias or reaction against defendant. We agree with plaintiffs. No such prejudice was apparent here in the sense used under section 352. Additionally, although the trial court and defendant mainly focused on prejudice, plaintiffs further argue that the evidence would not have resulted in a confusion of the issues or misleading of the jury. Again, we agree with plaintiffs. The November 2010 evidence would have been of the same type as was introduced concerning the March 2010 diagnostic test, simply more remote in time. Since the jury capably heard and considered other postwarranty evidence relating to the existence or nonexistence of engine problems, there is no reason to believe it would have been misled or confused by this particular evidence. Moreover, as plaintiffs correctly pointed out in their opening brief: “If the defense had wanted to argue that the testing was too late in the day for the defects to be considered a continuation of the old ones, it could have made that argument to the jury. It went to weight, not admissibility.” We hold there was no reasonable basis for the trial court to conclude that the probative value of the evidence was substantially outweighed by the probability that its admission would

result in undue prejudice, confusion of issues or misleading the jury. Accordingly, the trial court abused its discretion in excluding the evidence under section 352.

III. Erroneous Evidentiary Rulings Were Not Prejudicial

Plaintiffs contend the exclusion of its postwarranty evidence of recurring engine problems was prejudicial error because the evidence was material to a main issue in the case—namely, whether defendant actually resolved or repaired the defect. Defendant argues that the errors, if any, were harmless because the excluded evidence was largely cumulative and of marginal evidentiary value. That is, the excluded evidence would not have made a difference in the outcome. On the record before us, we agree with defendant.

“The standard for deciding whether the erroneous refusal to admit evidence constitutes grounds for reversal is well-settled. A case will be reversed for trial error only when the error results in a ‘miscarriage of justice.’” (*Loftleidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp.* (1984) 158 Cal.App.3d 83, 95; see Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Under the seminal case of *People v. Watson* (1956) 46 Cal.2d 818, “a ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Id.* at p. 836; the *Watson* test.) The Supreme Court has clarified that “‘a ‘probability’ in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.’” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, quoting *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) An erroneous exclusion of evidence will be deemed harmless or nonprejudicial (i.e., no miscarriage of justice) if the evidence was “‘of so little materiality or value that its admission would not have had any substantial influence on the result,’” or it “‘would have been merely cumulative or corroborative of evidence properly in the

record.’ [Citation.]” (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 255; see 9 Witkin, Cal. Procedure (10th ed. 2008) Appeal, § 431, p. 486.)

In considering whether the excluded evidence would have affected the outcome under the *Watson* test, we find it helpful to briefly recapitulate what the jury was called upon to decide and the nature of the evidence that was before it.

Liability under the Song-Beverly Act requires a plaintiff to prove that there was a defect in the vehicle and the defendant/manufacturer or its authorized repair facility failed to repair the vehicle to conform to the applicable express warranty after a reasonable number of attempts. (Civ. Code, § 1793.2, subd. (d)(1).) Here, the jury found by special verdict that plaintiffs’ truck suffered from a defect “that substantially impaired” its “use, value or safety.”⁶ However, the jury also found that defendant was successful in repairing the truck to conform to the express warranty in a reasonable number of attempts. The latter finding was fatal to plaintiffs’ Song-Beverly Act claim.

In reaching its verdict, the jury heard extensive testimony of the history of the truck’s engine problems and the repairs that were performed. That testimony reflected that the truck was brought in for repairs for a variety of complaints in the first few years of plaintiffs’ ownership, but after March 2008, the main problem (aside from an occasional “check engine light”) for which repairs were sought was the cranking and starting deficiency. After the March 2009 repairs concerning the cranking and starting problem, plaintiffs did not bring the truck in for any further repairs under the warranty. Plaintiffs did not argue or make an offer of proof that the cranking and starting problem ever returned, and we have found nothing in the record to indicate a recurrence of that serious problem. In March 2010, three months after the expiration of the warranty,

⁶ A defect or “nonconformity” is one which “substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.” (Civ. Code, § 1793.22, subd. (e)(1).)

defendant's expert inspected the truck. The computer diagnostic test showed no error codes and the truck performed normally in a test drive. Defendant's expert testified the truck was functioning fine at that time, plaintiffs' expert (who was present) agreed with that assessment, and plaintiff Cobi Revious admitted to the same at the time of said inspection.

Plaintiffs continued to drive the vehicle after the March 2009 repairs and put a considerable number of miles on it. In March 2009, the mileage on the truck was 72,000. By the time of the March 2010 test/inspection of the truck by defendant's expert, the mileage was 84,000; and by the time of the November 2010 test/inspection by plaintiffs' expert, the mileage was 93,000. Hence, in November 2010, 11 months after the warranty expired, the truck had been driven 9,000 miles since the March 2010 inspection and 21,000 miles since the last repair requested under the warranty.

Against this backdrop, plaintiffs attempted to persuade the jury that the defects were never repaired. Although the trial court sustained objections during testimony by both plaintiffs, the jury heard testimony of continuing issues that plaintiffs were experiencing with the truck. As noted, plaintiff Aaron Revious testified about a "[h]igh pitch squealing noise when the fan clutch engages when pulling a load," which was continuing intermittently. He also testified that the truck continued to have "a significant lag on acceleration, typically from a stop sign." In later testimony, he again referred to the lag in acceleration and commented that he did not believe that the truck was permanently repaired. On redirect, plaintiff Aaron Revious was asked if there had ever been a time after the March 2009 repair that he did not have problems with the vehicle. He responded: "No, there seemed to be always a delay from a start or a lag that was noted early on," which problem was most noticeable when "leaving a stop sign or a stoplight." Although plaintiff Cobi Revious was not permitted to testify about specific problems she currently experienced with the truck, she was permitted to tell the jury that she did not believe the truck was ever permanently fixed, she did not trust the truck

because of concerns about engine problems, she and her husband would not take trips by themselves in the truck due to its lack of reliability, and they would not sell it because the person who bought it would be stuck with the same problems.

Plaintiffs' expert testified that plaintiffs' truck had never been properly repaired because "there [was] no indication that the root cause and the root problems were ever actually addressed," and the same types of symptoms continued to recur. Further, based on plaintiffs' testimony about how the vehicle "[was] still acting up" in ways that "[were] consistent with its repair history," he testified that the vehicle was currently in need of repair.

In light of the entire record, it appears the November 2010 error codes evidence would not have affected the outcome.⁷ The jury heard from plaintiffs that the truck was continuing to experience a lag in acceleration and occasional squealing when the fan clutch engaged, and the jury also heard from plaintiffs' expert that the root problems were never fixed. Thus, the jury was well aware of such reported ongoing problems but nonetheless found the defect had been repaired during the warranty period. This could only mean the jury was convinced the defect was fixed by the March 2009 repair and that the truck remained in good condition through the end of the warranty period to at least the time of the March 2010 test/inspection. Plaintiffs' evidence of intermittent squealing sounds, lag in acceleration and the like was plainly deemed insufficient to alter that conclusion. The November 2010 error code evidence was not only more of the same, but that test was conducted so long (and so many miles) after expiration of the warranty period and the March 2010 test/inspection (in which the truck was admittedly working fine), that it was simply too remote and tenuous to have reasonably impacted the outcome

⁷ The excluded evidence included the diagnostic test of plaintiffs' truck in November 2010, which showed error codes for lag on acceleration, fuel injectors and check engine light, and the testimony of plaintiffs' expert concerning those error codes.

of the case. As to the sustained objections to plaintiffs' testimony, it appears that elsewhere one or both plaintiffs were permitted to inform the jury of the perceived ongoing problems with the truck; therefore, no prejudice resulted.

In summary, although the trial court abused its discretion in making the challenged evidentiary rulings,⁸ plaintiffs have failed to demonstrate those rulings were prejudicial under the standard of *People v. Watson, supra*, 46 Cal.2d at page 836, as was their burden,⁹ and our own review of the record convinces us the errors were harmless under that standard.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant.

Kane, J.

WE CONCUR:

Cornell, Acting P.J.

Franson, J.

⁸ Because only a partial exclusion of evidence occurred concerning plaintiffs' theory that the defect was not repaired, the error was not reversible per se. Rather, actual prejudice under the *Watson* test had to be shown. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1115.)

⁹ Plaintiffs, as appellants, had the burden of showing not only error, but that the error was prejudicial. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.)