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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CONSTANTIN ZUBIN, Plaintiff and Appellant, v. TOYOTA MOTOR SALES, U.S.A., INC., Defendant and Respondent.	D071896 (Super. Ct. No. 37-2014-00014925-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Michael E. Lindsey for Plaintiff and Appellant.

Beatty & Myers, John Myers IV; Horvitz & Levy and Joshua C. McDaniel for Defendant and Respondent.

INTRODUCTION

Constantin Zubin sued Toyota Motor Sales, U.S.A., Inc. (Toyota), claiming violations of the Song-Beverly Consumer Warranty Act (Song-Beverly Act; Civ. Code,

§ 1790 et seq.)[1] in connection with his 2013 Toyota FJ Cruiser (vehicle). A jury rejected Zubin's claims, finding that Toyota repaired his vehicle to match its written warranty after a reasonable number of opportunities and did not breach an implied warranty on the vehicle. The trial court entered judgment accordingly for Toyota.

Zubin appeals, contending: (1) the court made erroneous discovery-related orders, such as appointing a discovery referee and granting a limited protective order in Toyota's favor; (2) the court made erroneous pretrial evidentiary rulings, including permitting Toyota to introduce evidence of Zubin's tampering with the vehicle and his counsel's theft of a defense video recording; (3) the trial date should have been continued because Toyota provided Zubin with allegedly defective trial exhibits six days before trial began; (4) the court prejudicially erred in failing to instruct the jury on Zubin's claim under section 1793.2, subdivision (b), which generally requires a manufacturer to service or repair a consumer good to conform to its warranty within 30 days; (5) the court did not properly read back testimony in response to a jury question during deliberations; and (6) the court erred in denying Zubin's motion for judgment notwithstanding the verdict (JNOV).

For reasons we explain, we conclude Zubin has failed to establish reversible error and affirm the judgment.

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1 Further unspecified statutory references are to the Civil Code.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Vehicle History and Complaint*

In June 2013, Zubin and his business partner purchased the new vehicle together from Mossy Toyota (dealership). They had no issues with the vehicle during its first eight months. After Zubin's business partner permanently moved out of the country in January 2014, Zubin began reporting some drivability issues.

On February 4, 2014, Zubin brought the vehicle to the dealership, reporting the car had hesitated on the freeway while he was driving 65 miles per hour (MPH) and then regained power about five seconds later, causing the "check engine" light to turn on. A technician connected Toyota's computer to the vehicle and found diagnostic trouble codes[3] stored for the throttle sensors (P0121, P0123, P2135), fifth ignition coil (P0355), and a startability malfunction (P1604). The technician inspected the wiring, cleared the

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2 Except where noted otherwise and following well-settled appellate rules, we recite the facts in the light most favorable to the prevailing party (Toyota), giving it the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 387; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 747.)

3 As Toyota's experts testified, newer cars are required to utilize a computer system called "OBD2," which stands for onboard diagnostics, second generation. OBD2 stores "diagnostic trouble codes" (sometimes referred to herein as diagnostic codes or codes), which are letters and numbers corresponding to a malfunction that have generated the "check engine" light. The codes assist technicians in diagnosing the failure of a specific circuit or component. When a customer brings in a vehicle that has flashed the "check engine" light, a Toyota technician can connect a designated laptop computer to the vehicle and download the OBD2 information.

codes, saved "freeze-frame" data,[4] and test drove the car, but no codes returned. The technician could not duplicate the issues reported by Zubin.

On February 11, 2014, Zubin brought the vehicle to the dealership again, reporting it had jerked and lost power while he was driving on the freeway, triggering the check engine light. The technician found the same diagnostic codes stored as before (minus the startability malfunction) and saved freeze-frame data, but he could not duplicate the reported issues either in the shop or during a test-drive.

On March 18, 2014, Zubin had the vehicle towed to the dealership. He reported the check engine light turned on while he had been driving 25 to 30 MPH and he had been unable to start the car that morning. Zubin also told the technician that two weeks earlier, he had disconnected the battery and then reconnected it when the vehicle would not start, based on advice he found on the internet. Given the repeated instances of finding diagnostic codes relating to the throttle body, the technician decided to replace the throttle body.

On March 28, 2014, Zubin had the car towed to the dealership again because it would not start. He said the vehicle had stalled once while driving a couple of days before. The technician found diagnostic codes relating to all six of the vehicle's ignition

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[4] Toyota's experts explained that freeze-frame data is a two-and-one-half second "snapshot" of data pertaining to the vehicle at the time the malfunction occurred, including, for example, the vehicle's speed, engine speed, and temperatures of various components. Freeze-frame data is a diagnostic tool. According to Toyota, the data is only retained in Toyota's system if a technician consciously decides to store it using a certain computer application.

coils, which can occur based on the failure of only one coil. The technician believed that Zubin's reported issues were being caused by the fifth ignition coil, so he replaced that part.

On April 16, 2014, Zubin brought the vehicle to the dealership, reporting it had "sputter[ed]" while he was driving on the freeway and generated the check engine light. The technician found one diagnostic code, a "cylinder 3 misfire," related to the fuel injector (P0303). He saved freeze-frame data, cleared the code, and test-drove the vehicle multiple times, but could not duplicate Zubin's reported problem. After each of Zubin's visits to the dealership, the car was returned to him in seemingly proper working condition.

In May 2014, Zubin filed a complaint against Toyota, including three causes of action under the Song-Beverly Act. He sought damages in the form of "replacement or reimbursement" for his vehicle, civil penalties, any incidental damages, costs, and attorney fees. Zubin claimed Toyota: (1) failed to repair the vehicle's defects to match the written warranty after a reasonable number of attempts (§ 1793.2, subd. (d)); (2) failed to complete repairs to match the written warranty within 30 days (*id*., subd. (b)); and (3) breached express and implied warranties (§ 1794, subd. (a)).

On June 7, 2014, Zubin brought the vehicle to the dealership, saying it had stalled and jerked while he had been driving on a road, causing the check engine light to come on. The vehicle registered the diagnostic code for the fifth ignition coil (P0355). The technician cleared the code, saved freeze-frame data, test-drove the vehicle for over 60 miles, and found none of the reported issues.

B. *Evidence of Tampering*

On July 12, 2014, Zubin brought his vehicle to the dealership again, claiming it had "stuttered" while he was driving 45 MPH and that the check engine light had come on. The dealership technician found diagnostic codes for the throttle sensors (P0121, P0123, P2135) and fifth ignition coil (P0355), same as on some of Zubin's previous visits to the shop. The technician who had been working on Zubin's car asked Carl Richardson, the shop foreman, for assistance with diagnosing the problem. Richardson had never seen a repetition of throttle codes, especially *after* the throttle body had been replaced. In consulting with Toyota's field technical specialist, Jim Daher, Richardson noticed other unusual circumstances.

For example, Toyota's technician could never replicate Zubin's reported issues in the shop or during test-drives. Richardson and Daher observed that Zubin's reports of how the vehicle's issues occurred were inconsistent with the stored freeze-frame data. Zubin had been reporting that he was driving his car at various speeds when the check engine light came on, yet the freeze-frame data showed that the vehicle was parked, idling, and going zero MPH. Richardson and Daher conducted some testing and found that, by simply unplugging the throttle connectors, with the vehicle parked and idling, they could generate the same diagnostic codes and freeze-frame data as had been stored in relation to Zubin's previous visits.

As a diagnostic tool, Richardson and Daher decided to apply red touch-up paint to seal the throttle body connection points. If the connections were somehow coming loose or getting unplugged, then upon inspection, the paint would show a crack. As it turned

out, after this "tamper" paint was applied to the throttle connectors, Zubin never again reported a return of the check engine light nor did the throttle-related diagnostic codes register.

On October 13, 2014, Zubin brought his car in to the dealership for a safety recall and to show the technician some videos he had made earlier that day of the car appearing to lose power and being difficult to start. The videos did not show the check engine light coming on. Zubin picked up the vehicle before the technician could provide any diagnosis.

C. *The Vehicle Inspection*

Meanwhile, litigation was underway. In connection with ongoing discovery, the parties organized an inspection of the vehicle on October 29, 2014, at the dealership. Initially, the following individuals were present at the inspection: Zubin's expert witness (Timothy Saurwein); the dealership's foreman (Richardson); Toyota's field technical specialist (Daher); Toyota's testifying expert witness (Robert Landis); and Toyota's litigation counsel (Sean Beatty). Beatty was recording the inspection, including the engine compartment, with a video camera (defense video camera).

As he inspected the vehicle, Zubin's expert noticed the red "tamper" paint on the throttle connectors and stepped away to make a phone call. About five or 10 minutes later, Zubin's litigation counsel, Michael Lindsey, arrived at the inspection and stood at the front of the vehicle, blocking anyone else's access to the vehicle from the spot where he stood. Within the next few minutes, Lindsey physically confronted Beatty, took the defense video camera out of Beatty's hands, and left. Police officers responded to the

scene, and the inspection could not be completed. The defense video camera and recording were never recovered.

The parties rescheduled the inspection less than two weeks later, on November 11, 2014. However, at this inspection, Toyota's personnel discovered that the vehicle's engine compartment had been "completely detailed and sanitized," erasing previously visible dirt and markings.

During the inspection, both parties' experts (1) tested the vehicle, including checking wires, components, and connectors; (2) ran computer diagnostics; and (3) test-drove the vehicle for 40 or 50 miles. The experts could not replicate any of Zubin's reported issues, and they found no problems with the car.

D. *Discovery, Motions in Limine, and Trial*

Prior to and after the vehicle inspections, Zubin served written discovery requests. After receiving Toyota's responses, he filed numerous motions to compel further responses. Toyota eventually moved for a protective order and requested the appointment of a discovery referee. The court appointed a referee and ultimately issued a limited protective order. The discovery proceedings are discussed in detail, *post*.

Prior to trial, Zubin filed various motions in limine, including motions to exclude evidence related to Toyota's tampering defense (motion Nos. 6 and 16) and a motion to exclude evidence of the vehicle inspection altercation and theft of the defense video camera (motion No. 7). The court denied Zubin's motions. These motions are also discussed in detail, *post*.

At trial, the jury heard Zubin's account of the vehicle's drivability issues and repair history. He sought to show that the vehicle was defective and that he had no reason to tamper with it. However, Zubin's expert admitted that: (1) he had thoroughly tested the vehicle; (2) he was unable to replicate the reported issues or find any problems; and (3) the vehicle was operating "normally," with no malfunctions, as of the last inspection date.

Toyota's theory at trial was that the vehicle had no significant defects or that external tampering had interfered with diagnosing any issues the vehicle had been experiencing and, in any event, the vehicle had been properly repaired after a reasonable number of attempts. Richardson, Daher, and Landis testified to the history of service visits and their findings, which suggested tampering and/or improper interference. Landis further testified that the diagnostic codes could have been generated by unplugging the "three easiest connectors that [someone] could reach," i.e., the throttle, ignition coil, and fuel injector, without any tools. The jury also received unrebutted evidence of the vehicle inspection altercation, unrecovered defense video recording, and cleansed engine compartment. Zubin did not refute Toyota's evidence that someone could generate the recurring diagnostic codes and stored freeze-frame data as his vehicle had experienced by unplugging the connectors at issue and then immediately plugging them back.

After Zubin rested his case and prior to jury deliberations, the trial court and parties discussed appropriate jury instructions. Based on an objection/request from Toyota, the court decided not to instruct the jury on Zubin's second cause of action under section 1793.2, subdivision (b). His counsel also stated on the record that Zubin only

sought damages in the form of "restitution" i.e., for "the buyback of the car." The instructional issue is addressed in the discussion, section IV, *post*.

After deliberating for one day, the jury returned its special verdict, finding in Toyota's favor on Zubin's two remaining causes of action. On his cause of action for failure to promptly repurchase or replace a new motor vehicle (§ 1793.2, subd. (d)), the jury found that although the vehicle had a covered defect that substantially impaired the vehicle's use, Toyota had not failed to repair the vehicle after a reasonable number of opportunities. On Zubin's cause of action for breach of implied warranty (§ 1794, subd. (a)), the jury found that the vehicle was of the same quality as other vehicles generally acceptable in the trade or was fit for the ordinary purposes for which it was used.

E. *Posttrial Motions and Appeal*

After the court entered judgment for Toyota, Zubin filed motions for JNOV and a new trial, as well as a motion to strike or tax Toyota's costs. The trial court denied the motions, except that it taxed the award of Toyota's costs incurred for the referee's fees by 20 percent. This appeal followed.

DISCUSSION[5]

I. *Zubin's Challenge to the Trial Court's Discovery-related Orders*

Zubin challenges a number of the trial court's discovery-related orders, starting with the appointment of a discovery referee. Broadly speaking, Zubin contends that

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5 We address the appellate issues chronologically to provide better context for each issue.

Toyota engaged in a series of manipulative tactics designed to deprive him of evidence related to its "tampering" defense. He fails to mention that, by the conclusion of expert discovery and at least six months before trial, Toyota fully disclosed its evidence of tampering. We first provide further background and then discuss Zubin's arguments.[6]

A. *Further Background*

1. *Summary of events leading to appointment of discovery referee*

In June 2014, Zubin propounded on Toyota his first set of form interrogatories,[7] requests for admission (Nos. 1 to 19), inspection demands (Nos. 1 to 33), and special interrogatories (Nos. 1 to 20). Toyota responded and produced approximately 332 pages of documents. Within its discovery responses, Toyota objected to producing any general information relating to FJ Cruisers broadly (e.g., procedures, surveys, marketing, or product design documents) or to providing a detailed written explanation of its affirmative defenses, as well as mostly objected to and/or denied Zubin's requests for admission.

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6 We have endeavored to address all of Zubin's arguments despite being significantly hindered by his failure to provide (1) a cohesive summary of discovery proceedings or (2) adequate legal authorities and record citations in his briefing (see Cal. Rules of Court, rule 8.204(a)).

7 Official form interrogatories are developed by the Judicial Council for use in civil actions. (Code Civ. Proc., §§ 2030.030, subd. (a)(2), 2033.710.) One of the form interrogatories (No.15.1) required Toyota to identify each of its affirmative defenses and to "state all facts" supporting the affirmative defense. Another of the form interrogatories (No. 17.1) required Toyota to "state all facts" supporting any response to each of Zubin's requests for admission that was not an unqualified admission.

Zubin filed motions to compel further responses to his first set of special interrogatories and inspection demands, which the court granted in part and denied in part. The court ordered Toyota to provide further responses to certain special interrogatories and inspection demands, while finding that certain other discovery requests were overbroad. Toyota provided supplemental responses as the court ordered.

In October 2014, Zubin propounded a second set of special interrogatories (Nos. 21 to 38) and inspection demands (Nos. 34 to 51), to which Toyota objected and responded. Many requests in Zubin's second set of discovery requests required Toyota to "state all facts" and produce "any and all" documents relating to specified diagnostic trouble codes. In November 2014, Toyota produced an additional 380 pages of documents in response to Zubin's first and second sets of inspection demands. Within the 712 pages of documents produced by Toyota were service/repair records (including freeze-frame data and diagnostic trouble code reports), sales records, and warranty documents relating to the vehicle.

The vehicle inspections, with the physical altercation between counsel and claims of theft and/or suppression of evidence, occurred in October and November 2014. In January 2015, Toyota provided supplemental discovery responses that, for the first time, explicitly attributed the "likely cause" of the vehicle's reported issues to "tampering, or abuse/vandalism." Zubin's counsel accused Toyota of concealing the tampering defense up until that point, while Toyota steadfastly maintained that it had no obligation to provide what it characterized as "impeachment" evidence.

In January 2015, Zubin served a third set of special interrogatories (Nos. 39 to 75, exceeding the default statutory limit of 35 special interrogatories per case)[8] and inspection demands (Nos. 52 to 72). Zubin's third sets of discovery again centered around the diagnostic trouble codes, with some requests repeating prior requests virtually verbatim.

One week later, Zubin propounded a fourth set of special interrogatories (Nos. 76 to 95, further exceeding the default statutory limit) and inspection demands (Nos. 73 to 95); he also served second sets of requests for admission (26 in number) and form interrogatories.[9] The latest discovery requests sought various internal policy and procedure documents (e.g., all written "procedures used by Toyota or [its] dealers for the handling of purchaser complaints regarding Toyota vehicles"), and certain requests arguably called for information protected by the attorney work product privilege (e.g., "If you contend that any of the PROBLEMS with the VEHICLE were caused by tampering, please produce any and all DOCUMENTS which support this contention"). Zubin further requested that Toyota supplement/update its responses to any previously served interrogatories and inspection demands. Toyota asserted objections to Zubin's third set of discovery requests.

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8 Code of Civil Procedure, section 2030.030, subdivision (b).

9 Zubin's second set of form interrogatories included No. 17.1, corresponding to requests for admission. See footnote 7, *ante*.

Between January and February 2015, Zubin filed motions to compel further responses with respect to his first set of special interrogatories, second set of special interrogatories, and second set of inspection demands.

In March 2015, Toyota objected to Zubin's fourth set of discovery, filed a motion for protective order,[10] and requested the appointment of a discovery referee. Toyota's motion for protective order and request for a discovery referee were supported by, inter alia, the declarations of its counsel, Zubin's discovery requests, and Toyota's responses. Toyota described the parties' unrelenting discovery disputes, the undue burden on Toyota in responding to Zubin's discovery requests given the amount in controversy,[11] and the hostile relationship shared by counsel, making informal attempts to resolve disputes futile.

In opposition, Zubin argued that he could not afford to pay for a discovery referee and should not be required to "match resources" with Toyota. He provided no evidence of his financial resources or inability to pay for a referee. Zubin insisted that his

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10 Toyota moved for an order "(1) excusing defendant from answering all pending and further discovery requests, (2) finding that the number of discovery requests is unwarranted and constitutes an undue burden and expense and prohibiting plaintiff from propounding any further discovery without prior Court approval, (3) prohibiting plaintiff from requesting the production of documents related to other customers and other vehicles beyond the subject vehicle, (4) prohibiting plaintiff from requesting the production of documents regarding [Toyota's] internal policies and procedures which were never used in this case, and (5) appointing a discovery referee."

11 Toyota submitted evidence that the vehicle's cash retail price had been only about $33,500.

propounded discovery was reasonable and necessary in light of Toyota's "new" tampering allegations.

During the April 2015 hearing on the parties' pending motions, the court acknowledged that exceptional circumstances were required to appoint a referee and found it was necessary in this case. On the record, the court discussed that it had considered the "the number of times that [the parties] keep coming into this department," the likelihood of further discovery disputes, the particularly acrimonious relationship between the parties and counsel, the need for there to be someone who could efficiently resolve the parties' ongoing discovery disputes and keep the case on schedule, and the court's inability to devote the time the parties needed. The court summarized as follows: "The volume of the motions and the acrimony of the parties is what has ultimately persuaded the [c]ourt that this case should go to a referee."

In addition, the trial court stated its inclination to appoint former San Diego County Superior Court Judge Thomas P. Nugent (retired) as referee, but also gave the parties an opportunity to research Judge Nugent's credentials, file an objection, and propose their own nominees. Although Zubin opposed any discovery reference, he did not object to Judge Nugent per se nor did he propose any other nominees. The court appointed Judge Nugent (the referee). The court documented the appointment on Judicial Council form ADR-110, "order appointing referee," which attached and incorporated by reference the minute order from the parties' hearing. Noted on the order, the court found that no party had established an economic inability to pay a pro rata share of the referee's fees—a finding unchallenged on appeal.

The court ordered (1) Toyota to advance the referee's fees and costs subject to reallocation after the referee submitted his recommendations and (2) all pending and future discovery motions to be heard by the referee until further order of the court.

2. *Summary of events after discovery referee was appointed*

According to the referee's first report to the court in August 2015, the referee reviewed Toyota's motion for protective order and eight motions filed by Zubin to compel further responses to sets two, three, and four of special interrogatories and inspection demands as well as several form interrogatories (Nos. 17.1 and 12.1). The referee recommended granting a limited protective order because Zubin had propounded an excessive number of discovery requests, some of which were overbroad and seeking irrelevant information, but at the same time, Toyota was obligated to respond to requests directed to its tampering defense. The referee's report reviewed each request by number and, as to Zubin's motions to compel, recommended whether to grant, deny, or limit a certain request or response in some manner. Further, the referee recommended an "even division" of the referee's initial fees. The court adopted the referee's recommendations as an order except it decided not to reallocate the referee's fees until the end of the case.

Meanwhile, Zubin had filed and was continuing to file additional motions to compel discovery responses. The referee reviewed these motions and made recommendations to the court in December 2015. In his report, the referee remarked that Zubin had "again overreached and in many instances has required the review of what are obviously duplicate requests. [Toyota] however has matched the fault level by consistently responding to requests approved by the court with a direction to

'go fish' . . . ." The referee's report noted that Toyota's experts had been deposed by that time and Toyota should be able to identify the evidentiary basis for its tampering defense; the referee accordingly recommended granting Zubin's motion to compel a further response to form interrogatory No. 17.1, which would require Toyota to identify evidence to support its claim that Zubin had tampered with the vehicle. The referee again recommended an equal division of the referee's fees. The court adopted the referee's recommendations on the discovery disputes.

After trial concluded, Toyota sought to recover from Zubin the referee's fees and other discovery-related costs as Toyota's costs of suit because it was the prevailing party. The court awarded Toyota its costs; however, in consideration of Toyota's fault in the parties' discovery disputes, the court reduced the total discovery-related cost award by 20 percent.[12]

B. *Guiding Principles Regarding Appointment of Discovery Referees*

"Ordinarily, discovery disputes are resolved by the trial court, and . . . [parties] need not pay any fee to obtain such resolution. Under section 639, subdivision (a)(5) of the Code of Civil Procedure, however, a trial court is permitted to appoint a referee to 'hear and determine any and all discovery motions and disputes . . . and to report findings and make a recommendation thereon,' and section 645.1, subdivision (b) of the Code of Civil Procedure, in turn, permits the court to 'order the parties to pay the fees of referees

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12 The referee's fees and other discovery-related costs totaled about $31,100, of which 20 percent is about $6,200. Although the record is not entirely clear, the referee's fees alone appeared to total about $26,800.

who are not employees or officers of the court . . . in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties.' " (*Jameson v. Desta* (2018) 5 Cal.5th 594, 620.)

Without the parties' consent, a court must find it "necessary" to appoint a discovery referee. (Code Civ. Proc., § 639, subd. (a)(5); Cal. Rules of Court, rule 3.920(a) ["exceptional circumstances" required for appointment of discovery referee].) Moreover, without the parties' agreement, orders directing all discovery motions to a referee are appropriate only in unusual cases. (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105 (*Taggares*) [listing factors to consider]; see also *Hood v. Superior Court* (1999) 72 Cal.App.4th 446, 449, fn. 4 [court should normally hear "run-of-the-mill" discovery motions in contrast to particularly complex disputes that will involve an extraordinary expenditure of judicial time].)

Section 639 of the Code of Civil Procedure requires all appointments of a discovery referee to be by written order and include specified findings, such as the parties' ability to pay the referee's fees. "Reference to a discovery referee imposes a substantial economic burden on . . . a party [of modest means]. It is therefore incumbent on trial courts . . . to look beyond the benefit realized by the judicial system and consider the economic impact the order of reference will have on the parties." (*Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 615 (*Solorzano*); see also Code Civ. Proc., § 645.1.)

If the parties do not agree on the selection of a referee, each party is entitled to submit nominees for appointment and assert legal objections to any nominee, prior to the

court's selection of a referee. (Code Civ. Proc., § 640.) Legal objections may be based on specified grounds such as bias or incompetency. (*Id.*, § 641.)

On appeal, we review a trial court's ruling on a motion for a reference, as well as the court's decision to adopt a referee's recommendations, for abuse of discretion. (*Reed v. Reed* (1953) 118 Cal.App.2d 399, 400; *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 589.) "The abuse of discretion standard has been described generally in these terms: 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.' [Citation.] Under the abuse of discretion standard, '[w]here there is a [legal] basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court.' " (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1552 (*Sarpas*).)

To the extent the issues presented deal solely with statutory interpretation and application of statutory language to undisputed facts, our review is de novo. (*Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 284.)

C. *Analysis of Court's Appointment Order Referring All Discovery Motions to the Referee*

Zubin contends the trial court's written appointment order failed to include "the exceptional circumstances requiring the reference . . . specific to the circumstances of the particular case." (Code Civ. Proc., § 639, subd. (d)(2); Cal. Rules of Court, rule 3.922(c)(2).) He argues the court made no finding of necessity or "exceptional

circumstances" and, further, that the lack of a written finding was prejudicial because exceptional circumstances were not present.

As we have noted, the court's appointment order was memorialized on a Judicial Council form. On the designated area of the form calling for a statement of the exceptional circumstances for a discovery reference, the court incorporated by reference an attached minute order from the April 2015 hearing. The attached minute order indicated the nature of some of the parties' discovery disputes; that the court was granting in part and deferring in part Toyota's motion for a protective order; and that the balance of the parties' discovery disputes was to be reviewed by the referee. The minute order did not include a written statement delineating the court's oral remarks made during the hearing in which the court explained why it was finding that a discovery referee was particularly necessary and why the case was exceptional.

Assuming the court's written order was deficient, Zubin has not established prejudice since the court did, in fact, make a finding of necessity, and Zubin's counsel was present at the April 2015 hearing when the court made the finding. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 58 [" 'Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred.' "].) Without minimizing the importance of making tailored, written findings of necessity, we conclude there has been no miscarriage of justice here given that the trial court provided its rationale at the hearing, indicated on its written order that the "exceptional circumstances" finding was based on what had been discussed at the hearing, and the hearing transcript is available for our review. As we will explain,

we are persuaded that the court's finding of exceptional circumstances in this case, making a referee necessary, was appropriate. (Cf. *Hood v. Superior Court* (1999) 72 Cal.App.4th 446, 449.)

Courts have broad discretion to impose a discovery reference on nonconsenting parties " 'in the resolution of complicated, time-consuming discovery disputes.' " (*Taggares*, *supra*, 62 Cal.App.4th at p. 104.) A discovery reference may "induce parties to take a more reasonable approach to discovery to keep costs from mounting." (*Ibid*.) A trial court may not, however, use reference powers "in routine, pro forma, uncomplicated matters simply for expediency or a distaste for discovery resolution." (*Ibid*.)

In addition, although unusual, a court may direct all discovery motions to a referee in cases "where a majority of factors favoring reference are present. These include: (1) there are multiple issues to be resolved; (2) there are multiple motions to be heard simultaneously; (3) the present motion is only one in a continuum of many; [and] (4) the number of documents to be reviewed (especially in issues based on assertions of privilege) make the inquiry inordinately time-consuming." (*Taggares, supra,* 62 Cal.App.4th at p. 105.)

Based on our review of the record, we conclude the trial court acted within its discretion in finding exceptional circumstances and in referring all of the parties' discovery motions to the referee. Discovery proceedings were extraordinarily hostile. A single vehicle inspection had led to a physical altercation between counsel and stolen and/or spoliated evidence. Both parties essentially agreed that the allegations of consumer tampering in this case were uncommon. Zubin propounded voluminous,

frequently overbroad, and repetitive discovery requests and, in response to Toyota's position that evidence underlying its tampering defense was not discoverable, filed multiple discovery motions. Each discovery motion could not be reviewed in isolation but would necessitate a review of all the propounded discovery and responses to date in order to determine the reasonableness of a particular request. In light of this background and given the parties' acrimonious relationship, the court could reasonably anticipate many discovery disputes.

Similarly, a majority of the *Taggares* factors was present. There were multiple motions to compel further responses, which recurred and covered overlapping issues. Repeatedly, the parties disputed the proper scope of discovery, the proper use of discovery methods, whether Zubin was entitled to exceed the statutory limits on discovery requests, whether and to what degree Toyota must disclose evidence of tampering, and whether and to what degree Toyota must produce general information about FJ Cruisers as might occur in a products liability class action. Zubin's counsel litigated the case at times like a class action and, in turn, Toyota conducted its defense as if it was or may become one. The court did not abuse its discretion in deciding that all of the discovery motions should be heard by the referee.

D. *Analysis of the Referee's Fees and Their Manner of Allocation*

Zubin further argues the court did not consider the financial implications and costs of ordering a referee,[13] the court's manner of allocating the referee's fees was not fair and reasonable (Code Civ. Proc., § 645.1), the referee should not have been allowed to allocate his fees among the parties, and the court required Zubin's counsel to pay the referee's fees.

"Under [Code of Civil Procedure] section 645.1, the trial court may, at the time the referee is appointed, order the parties to pay the referee's fees 'in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties.' " (*Marathon Nat. Bank v. Superior Court* (1993) 19 Cal.App.4th 1256, 1261 (*Marathon Nat. Bank*).) "It is . . . the responsibility of the court, not the referee, to determine what manner of payment is 'fair and reasonable' to the parties. (§ 645.1; [citation].) In performing its judicial function, the court must avoid even the appearance of unfairness[.]" (*Taggares*, *supra*, 62 Cal.App.4th at p. 105.) We presume the trial court has weighed all appropriate factors in the exercise of its discretion on how to

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13 Zubin asserts the court failed to comply with the statutory referee selection process by appointing Judge Nugent, a recently retired colleague. (Code Civ. Proc., § 640, subd. (b).)

We conclude Zubin's argument is unsupported by the record. The trial court gave the parties an opportunity to research Judge Nugent's credentials, file any objections, and propose their own nominees for the court's consideration. Zubin did not assert legal objections to Judge Nugent nor did he propose any other nominees. There was no procedural error.

allocate fees in the absence of a showing to the contrary. (*DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1286 (*DeBlase*).)

We conclude there was no abuse of discretion in the trial court's consideration and allocation of the referee's fees. Many of Zubin's arguments are based on a faulty factual premise—that the trial court had evidence of Zubin's income or financial condition. However, he did not submit any evidence of his financial resources. The court was not required to accept Zubin's claims regarding his income at face value.[14] (See *DeBlase*, *supra*, 41 Cal.App.4th at p. 1284 ["Certainly, if counsel has reason to anticipate that a reference may be contemplated, counsel should bring a declaration [regarding client's income] to court."].) The court's finding that neither party showed an inability to pay a pro rata share of the referee's fees (capped at $500 per hour) stands unchallenged. Accordingly, most if not all of the cases relied on by Zubin, involving indigent litigants or litigants who declared their financial condition under penalty of perjury, are inapposite. (See, e.g., *Solorzano*, *supra*, 18 Cal.App.4th at p. 614 [indigent litigants cannot pay court-ordered fees by definition and thus cannot be made to pay the fees of a privately compensated discovery referee]; *McDonald v. Superior Court* (1994) 22 Cal.App.4th 364, 369 (*McDonald*) [litigant's declaration set forth her "severe financial problems"].)

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14 On appeal, Zubin claims that the referee's fees were almost half of his annual income, yet the record does not disclose Zubin's annual income.

Moreover, the trial court did consider the financial impact of the reference and endeavored to avoid any "appearance of unfairness" (*Taggares*, *supra*, 62 Cal.App.4th at p. 105). The concern with using privately compensated discovery referees is that it may "allow affluent litigants to avoid discovery compliance by pricing enforcement of legitimate discovery demands beyond the means of" less affluent litigants. (*McDonald*, *supra*, 22 Cal.App.4th at p. 369.) The court here ordered the referee's fees to be advanced by Toyota, subject to the referee's recommendation for reapportionment. In this manner, Zubin could enforce his "legitimate" discovery demands and both parties were motivated to minimize costs. The trial court was sensitive to the presumed disparity in financial resources between Toyota and Zubin. (*Marathon Nat. Bank*, *supra*, 19 Cal.App.4th at p. 1261 [fair and reasonable to require party that requested appointment of referee to pay fees subject to later reallocation based on the referee's recommendations]; see also *DeBlase, supra*, 41 Cal.App.4th at p. 1286 ["court should make a provisional fee allocation order, subject to readjustment after the referee returns a report and recommendation"].)

In due course, the referee reviewed voluminous motion papers and submissions, held oral argument, and wrote written reports to the court regarding Zubin's motions to compel further responses and Toyota's motion for protective order. The referee expressed some challenges with attributing fault for the parties' discovery disputes and, for the most part, recommended an equal division of fees based on his belief that the parties were equally blameworthy. After the conclusion of trial, Toyota sought to recover 100 percent of the referee's fees that it had paid as its costs of suit. Zubin argued in turn

that the referee's fees must be reallocated on account of the meritless positions taken by Toyota in discovery. The court took the matter under submission and ultimately reduced the costs sought by Toyota by 20 percent.

Zubin fails to establish how the court's reallocation was erroneous or constituted an abuse of discretion. In *Winston Square Homeowner's Ass'n v. Centex West* (1989) 213 Cal.App.3d 282, 293, the court held that an award of fees for a discovery referee is allowable under Code of Civil Procedure section 1033.5, subdivision (c)(4), as such fees are not specifically disallowed in subdivision (b) of the same section. In finding no abuse of discretion by the trial court, the Court of Appeal stated: "A special master having been appointed by the court, his or her fee is analogous to the award of '[f]ees of expert witnesses ordered by the court.' ([Code of Civ. Proc.] § 1033.5, subd. (a)(8); see *Estrin v. Fromsky* (1942) 53 Cal.App.2d 253, 255.) The expense of court-appointed experts is first apportioned and charged to the parties, and then the prevailing party's share is allowed as an item of costs. [Citation.] [¶] The trial court acted well within the broad discretion granted to it by [Code of Civil Procedure] section 1033.5, subdivision (c)(4), when it allowed the special master fees as an item of costs." (*Winston Square Homeowner's Ass'n*, at p. 293.)

Likewise, we find no error here. The trial court did not require Zubin to pay for the portion of discovery-related costs that it implicitly found was unnecessarily incurred by Toyota. Even if we might have reallocated the costs differently, we cannot say the trial court's reallocation exceeded the bounds of reason.

Zubin argues the court did not consider alternatives to a privately compensated discovery referee. We disagree. The court was aware of its own limitations and reluctantly determined that it could not retain the discovery disputes; it believed that the referee was in the best position to consider and decide the disputes in a timely fashion; and neither of the parties offered any alternative suggestions that would keep the case on schedule. As we have already noted, neither party established an inability to pay a private referee.

Zubin also argues the court improperly delegated its duty in allowing the referee to reallocate fees. To the contrary, allowing the referee to recommend a reallocation was a fair way of encouraging the parties to take reasonable positions in discovery and minimize their disputes. (See *Marathon Nat. Bank*, *supra*, 19 Cal.App.4th at p. 1261; *DeBlase*, *supra*, 41 Cal.App.4th at p. 1286.) The court considered the referee's reports and made the final decision on how to reallocate fees. There was no improper delegation of duty.

Zubin further argues the court required his *counsel* to pay the referee's fees. His argument is unsupported by the record. At one point in the proceedings, Toyota objected to continuously paying the referee's fees when the referee's first report recommended an "even division" of initial fees. Zubin's counsel asserted that his client was unable to pay a reallocated portion of the fees. The court wondered why, if Zubin was unable to pay the referee's fees at that juncture, counsel could not advance the amount. Although a court may not require contingent-fee counsel to pay for a discovery reference, it may "legitimately consider the extent to which the . . . litigant's expenses are being advanced

by counsel." (*DeBlase, supra,* 41 Cal.App.4th at pp. 1284-1285.) Regardless, the court decided that Toyota must continue paying the referee's fees until the conclusion of trial. The court's comments indicated that Zubin himself would ultimately bear the costs of the referee, not his counsel.

In summary, Zubin has failed to establish reversible error as to the referee's fees.

E. *Analysis of Referee's Recommendations*

Zubin contends the referee raised objections sua sponte that Toyota did not make and those objections should have been deemed waived. Zubin specifically identifies his inspection demands set No. 5, Nos. 96-101, as discovery requests to which the referee and court objected sua sponte.

Preliminarily, we note that Zubin cites no relevant authority to support the proposition that a referee/court is prohibited from asserting its own objections to discovery requests, particularly where, as here, the party opposing discovery has moved for a protective order to preclude the pending discovery requests and the court must decide whether, and to what extent, a protective order will issue. Instead, as a general proposition, trial courts have inherent power in civil cases to exercise reasonable control over all proceedings connected with pending litigation, including discovery matters. (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758 [trial courts' inherent powers are " 'not confined by or dependent on statute' "]; see also *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431-432 (*Obregon*) [trial judges "have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings"].)

Turning to the complained-of discovery requests, most of them are phrased in the format of requiring Toyota to produce documents related to specified legal contentions of tampering. For example, Zubin's inspection demand No. 96 states as follows:

> "If you contend that 'the computer on the subject vehicle recorded data when certain trouble codes set and plaintiff's account of the conditions under which the "problem" occurred is inconsistent with the data', please produce all documents as defined by California Evidence Code § 250 which support that contention, including, but not limited to 'the certain trouble codes', 'plaintiffs account', and all documents that refer to any 'inconsist[ency] with the data.' "

The quoted contention ("the computer on the subject vehicle . . .") was taken from Toyota's discovery responses, which were prepared by and/or with the assistance of its counsel. Toyota's objections to each inspection demand were identical, as follows:

> "Objection. This request is vague, ambiguous, unintelligible, overbroad and oppressive. In addition, the request violates the attorney-client, work-product and/or consulting expert privileges. Further, the request constitutes an unreasonable invasion of privacy and calls for the disclosure of private, proprietary and confidential information. Furthermore, the request violates California Code of Civil Procedure section 2019.030, as it is unreasonably cumulative, duplicative, and unduly burdensome and expensive taking into account the amount in controversy in this litigation. Finally, this request is the subject of a motion for protective order."

In its December 2015 report, the referee recommended denying Zubin's motion to compel responses to the demands because (1) they violated Code of Civil Procedure section 2030.060, subdivision (d); (2) demand Nos. 96 and 99 through 101 called for information protected by the work product privilege (Code Civ. Proc., § 2018.030, subd. (b)); and (3) demand numbers 97 and 98 were the subject of a previously granted request and were therefore duplicative.

Zubin complains that the referee erred in finding certain demands called for work product, which was one of Toyota's specified objections. Work product includes "a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" and is "not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a); see also *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1282-1283 [unwritten opinion work product is equally entitled to the protection of the absolute work product privilege in California and, thus, attorney could not be required to disclose which subpoenas she prepared based on documents she received from her client].)

We conclude there was no abuse of discretion. Zubin's fifth set of inspection demands sought documents that reflected or would implicate defense counsel's impressions or theories because the subject demands were tied to specified legal contentions that had been prepared with the assistance of Toyota's counsel. Prior to his fifth set of inspection demands, Zubin had already propounded various form interrogatories, special interrogatories, and inspection demands seeking documents and information underlying Toyota's tampering defense. Consequently, the referee reasonably concluded that Zubin's latest requests sought to invade counsel's legal theories.

Zubin also complains that the referee erred in finding that demands Nos. 96 through 101 violated Code of Civil Procedure section 2030.060, subdivision (d), which ostensibly relates only to interrogatories and provides that "each interrogatory shall be full and complete in and of itself," i.e., not include any preface or instructions. Although

the referee cited an arguably inapplicable code section, we infer the referee found Zubin's demands to be objectionable on grounds of burden due to their incorporated definitions and references to other sources. (See, e.g., *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223 [practice of incorporating external definitions and instructions into requests for production should be greatly limited to prevent unduly burdensome discovery].) Toyota asserted objections based on burden. Regardless of whether this was a proper ground for objection, because the motions to compel were denied on other proper or unchallenged grounds, the court did not err in adopting the referee's recommendations.

F. *Analysis of Court's Limited Protective Order*

The referee recommended granting a limited protective order in Toyota's favor, which the court adopted. For instance, Toyota was ordered to respond to discovery requests directed to its "tampering" defense, but not to other special interrogatories, inspection demands, and requests for admission that purported to extend beyond the subject vehicle or that were unjustified due to burden, privilege, or other grounds.

On appeal, Zubin contends that Toyota presented no evidence of burden or hardship to support its motion for protective order. We review an order granting or denying a motion for a discovery-related protective order under the abuse of discretion standard. (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1286-1287.)

The legal basis for the protective order issued by the trial court was based in part on Code of Civil Procedure section 2030.090: "When interrogatories have been

propounded, the responding party, and any other party or affected natural person or organization may promptly move for a protective order. . . ." (Code Civ. Proc., § 2030.090, subd. (a).) "The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (*Id.,* subd. (b).) A protective order may include the direction that "the set of interrogatories, or particular interrogatories in the set, need not be answered," "the response be made only on specified terms and conditions," or "the method of discovery be an oral deposition instead of interrogatories to a party." (*Id.,* subds. (b)(1), (4), & (5).) Protective orders of a similar nature are also available for inspection demands and requests for admission. (See *id*., §§ 2031.060, 2033.080.)

A trial court "shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).) However, as with other objections in response to interrogatories, the party opposing discovery has an obligation to supply the basis for this determination. An 'objection based upon burden must be sustained by evidence showing the quantum of work required.' " (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *W. Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417.)

"In considering whether the discovery is unduly burdensome or expensive, the court takes into account 'the needs of the case, the amount in controversy, and the

importance of the issues at stake in the litigation.' " (*Sarpas*, *supra*, 225 Cal.App.4th at p. 1552 [citing Code Civ. Proc., § 2019.030, subd. (a)(2)].)

In this case, to the extent Toyota sought a protective order relieving it from having to respond to specially prepared interrogatories exceeding 35 in number, it was not required to make a showing of burden. The *propounding* party, i.e., Zubin, bears the burden of justifying an excessive number of special interrogatories. (Code Civ. Proc., §§ 2030.030, 2030.040, subd. (a), 2030.040, subd. (b) ["If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party shall have the burden of justifying the number of these interrogatories."].) The referee and court found that Zubin had not met his burden of justifying a total of 95 special interrogatories.

Moreover, Toyota's motion for protective order was supported by its counsel's declarations, which, at minimum, gave the court an indication of the attorney time and fees Toyota would incur from responding to discovery, the amount in controversy, and the issues at stake in the litigation. Zubin cites no authority, and we are aware of none, that prohibits the court from considering attorney time and fees as part of the burden in responding to discovery. Toyota's counsel additionally provided the discovery requests to the court. The overbroad, cumulative, and duplicative nature of the discovery could be readily observed, thus supporting the inference of an improper purpose. (See *Obregon*, *supra*, 67 Cal.App.4th at p. 431 ["When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden."].)

Given the amount in controversy, with the key issue being whether the vehicle had been repaired or not, the court could reasonably find that Zubin had exceeded the proper scope of discovery by, for example, attempting to obtain information regarding *all* FJ Cruisers and, further, that Zubin could more conveniently obtain the detailed information he sought through depositions. We are satisfied the court had an adequate evidentiary basis to grant the limited protective order.

II. *Zubin's Challenge to the Trial Court's Evidentiary Rulings*

Zubin challenges the trial court's rulings that permitted Toyota to introduce evidence of tampering, which he claims was not produced during discovery. Zubin essentially contends the court abused its discretion by not imposing an evidence sanction on Toyota for its discovery conduct. Zubin further contends that the court should not have permitted Toyota to introduce evidence at trial of the vehicle inspection altercation and stolen video recording. As we will explain, the court did not err because Toyota disclosed its evidence of tampering well before trial, including the video recording.

A. *Further Background*

As we have noted, in response to Zubin's motions to compel, the court ordered Toyota to identify evidence of tampering.

In March 2016, within its supplemental responses to Zubin's third set of form interrogatories, Toyota disclosed that "Jim Daher put paint on certain connectors on plaintiff's vehicle on or about July 10, 2014." Within its supplemental responses to Zubin's fourth set of inspection demands, Toyota identified the following documents that supported its contention of tampering: "the vehicle's freeze frame data, Constantin

Zubin's statements (made in deposition and documented on the repair orders), the vehicle's diagnostic trouble codes, and the repair orders. [Toyota] also incorporates by reference the depositions of Jim Daher, Robert Landis, George Martes, and Jeff Strumph, including all documents produced at said depositions."

Also in March 2016, within its supplemental responses to Zubin's second set of form interrogatories, Toyota disclosed: "The vehicle was tampered with during plaintiff's ownership. [Toyota] is informed and believes that information about the tampering is in the possession of plaintiff. In addition, facts/evidence demonstrating the vehicle was tampered with are set forth in detail in the depositions of [Toyota's] expert witnesses, Jim Daher and Robert Landis, and George Martes and Jeff Strumph. This includes facts and evidence, including but not limited to, the vehicle's freeze frame data, Constantin Zubin's statements, the vehicle's diagnostic trouble codes, the repair orders, and the inspection and testing of plaintiff's vehicle and an exemplar vehicle." In addition to the documents already identified, Toyota identified "the video stolen by Michael Lindsey on October 29, 2014" as an additional piece of evidence supporting that the vehicle had been tampered with.

Zubin remained dissatisfied with Toyota's responses. He filed motion in limine No. 6 seeking to exclude "evidence supporting Toyota's affirmative defenses and denials not produced in response to form interrogatory 15.1," i.e., evidence of tampering or alterations. Zubin asserted that Toyota failed to produce or disclose any evidence of tampering during discovery and should therefore be precluded from introducing such evidence at trial as a sanction.

In response to the motion, Toyota argued that Zubin had not previously moved to compel a further response to form interrogatory No. *15.1* and thus waived his argument and, in any event, Toyota had produced all the evidence it had with regard to its "tampering" defense by the conclusion of expert depositions and discovery, including over 700 pages of records and 600 photographs relating to Zubin's vehicle. The court denied Zubin's motion in limine No. 6.

In addition, Zubin filed motion in limine No. 16 seeking to exclude any specific acts of tampering that Toyota claimed had caused or contributed to the vehicle's problems. As with motion in limine No. 6, Zubin asserted that Toyota's discovery responses were nonresponsive, evasive, and/or incomplete and Toyota should thus be prevented from introducing any such evidence as a sanction.

In opposition, Toyota asserted it had produced documents underlying its tampering defense, its expert witnesses had testified during their depositions regarding how they believed the vehicle had been tampered with, and Zubin's discovery complaints had already been addressed by the referee and court. The court denied Zubin's motion in limine No. 16.

Finally, Zubin filed motion in limine No. 7 seeking to preclude the jury from hearing any mention of the October 29, 2014 vehicle inspection "altercation" or "theft" of the defense video camera. Zubin claimed the incidents "did not happen," and the evidence of same was irrelevant and prejudicial. In response, Toyota argued that the events were relevant to show destruction of relevant evidence, that is, Toyota would have had a video of the engine compartment as it appeared at the first vehicle inspection

except that the video was stolen. Shortly after the video was stolen, the engine compartment was sanitized.

At a preliminary hearing held on September 1, 2016, the court received testimony from several witnesses, including Zubin's expert, a police officer, Richardson, Daher, and Landis. The court denied Zubin's motion in limine No. 7, finding that an altercation occurred and Zubin's counsel took the defense video camera without good reason, but ordered that Toyota could present only one witness at trial who had directly observed the altercation—Richardson—to describe his observations to the jury. The court required Toyota to produce Richardson for a deposition forthwith on a date of Zubin's choice. Trial did not commence until September 27, 2016.

B. *Analysis*

Motion in limine Nos. 6 and 16

Zubin contends that Toyota asserted various meritless objections to his discovery requests that were directed to obtaining evidence of tampering, such as "irrelevant" or "presently protected by the attorney-client and work-product privileges," and that Toyota should have been precluded from introducing evidence of tampering at trial. He complains that Toyota "disclosed no act of plaintiff that constituted tampering yet was permitted to accuse him of tampering at trial."

Toyota argues in response that certain evidence *was* irrelevant or privileged until the point of expert disclosures and that Toyota's tampering defense was fully disclosed by its experts during expert depositions and discovery.

"[A]bsent unusual circumstances, such as repeated and egregious discovery abuses, two facts are generally prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.) [¶] A trial court has broad discretion when imposing a discovery sanction. . . . [Its] order will not be reversed on appeal in the absence of a manifest abuse of discretion that exceeds the bounds of reason, resolving all evidentiary conflicts in favor of its ruling." (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559; see also Code Civ. Proc., 2023.030, subd. (c) [permissible sanctions for misusing discovery process].)

"Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*).)

Here, Zubin has failed to establish an abuse of the court's discretion in permitting Toyota to introduce evidence of tampering because, well before trial began, Zubin was provided with all the information Toyota intended to present at trial regarding "tampering." Toyota's principal evidence of tampering was the observations of its experts that Zubin's account of the vehicle's issues was inconsistent with freeze-frame data. During discovery, Toyota produced the vehicle's repair records reflecting the reported issues, freeze-frame data, and Toyota's expert's opinions. It additionally

disclosed that the stolen video recording was evidence of tampering. Although some of Toyota's initial discovery responses were evasive and/or nonresponsive, it provided supplemental responses when court ordered.

For instance, Toyota initially asserted that its evidence of tampering was for "impeachment" purposes and thus not discoverable, but it supplemented its responses when the court ruled otherwise. Toyota's experts described their specific bases for believing why the vehicle had been tampered with. Neither the referee nor court characterized Toyota's conduct as "egregious" or found any "willful" failure to comply with a discovery order. The court reasonably concluded there was no need to exclude evidence that Zubin had obtained prior to trial.

We note that the issue before us is not whether Toyota's objections and discovery responses were ideal or could have been better. Whatever might be said of Toyota's discovery tactics, the trial court was sufficiently satisfied with Toyota's disclosures and productions by the end of expert discovery. The court could reasonably conclude that the detailed exposition sought by Zubin regarding Toyota's tampering defense had been appropriately obtained through depositions. (See Code Civ. Proc., § 2019.030, subd. (a) [court shall restrict discovery method if discovery may be obtained from some other source that is more convenient or less burdensome].)

Moreover, despite all of Zubin's claims of concealed evidence, he fails to articulate some piece of trial evidence that was not disclosed during fact and expert discovery. He contends Toyota did not disclose any "specific" act of tampering by Zubin during discovery, but Toyota never claimed to know exactly how and when the tampering

occurred. Instead, its defense was based on a perceived pattern of inconsistency between Zubin's reports and Toyota's freeze-frame data as attested by its experts, especially after certain vehicle parts had been replaced. The court did not abuse its discretion in denying motion in limine Nos. 6 and 16.

Motion in limine No. 7

Zubin contends the court should not have allowed Toyota to present evidence of the altercation and video camera theft, arguing the events were contrived, irrelevant, and more prejudicial than probative.

Toyota responds that Zubin's counsel's conduct amounted to the destruction or suppression of evidence during discovery, was relevant, and was subjected to the trial court's weighing process under Evidence Code section 352. We find merit in Toyota's position.

" 'Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation. [Citations.] Such conduct is condemned because it 'can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.' [Citation.] While there is no tort cause of action for the intentional destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions.' " (*Williams*, *supra*, 167

Cal.App.4th 1215, 1223.) Sanctions may include "the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11-12 (*Cedars-Sinai*.).)

In a "substantial proportion of spoliation cases . . . there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor." (*Cedars-Sinai*, *supra*, 18 Cal.4th at p. 14.) Nonetheless, "in most cases of purported spoliation[,] the facts should be decided and any appropriate inference should be made by the trier of fact after a full hearing at trial." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1431; see CACI No. 204.)

Here, Zubin repeatedly asserts that Toyota "falsely" accused his counsel of stealing the defense video camera/recording following the vehicle inspection altercation. In his reply brief, Zubin raises new points as to why the accusations were "fabricated." However, the trial court preliminarily found that the allegations were not false, an altercation occurred, and Zubin's counsel took the video camera without good cause. At trial, evidence of the altercation and taken video recording was *unrefuted*. On appeal, we accept, as we must, that spoliation of evidence did in fact occur. (*Williams*, *supra*, 167 Cal.App.4th at p. 1224 [resolving all evidentiary conflicts most favorably to the trial court's ruling].) Namely, we accept as true that (1) Toyota's counsel was recording the vehicle at the inspection, which, like photographs of the vehicle, would have been

relevant evidence, and (2) the recording was "rendered unavailable" by Zubin's counsel (*Cedars-Sinai*, *supra*, 18 Cal.4th at p. 12).

Further, consistent with legal principles regarding spoliation, the jury could hear of the altercation, taken video recording, and engine sanitization, along with the instruction on willful suppression of evidence, i.e., that the jury "may consider whether one party intentionally concealed or destroyed evidence. If . . . so, [it] may decide that the evidence would have been unfavorable to that party." (CACI No. 204.) It would have been reasonable for the jury to infer that the video recording was in some way unfavorable to Zubin.

Zubin theorizes on appeal that Toyota had other opportunities to record the vehicle prior to the inspection and that Toyota also had photographs of the vehicle, making the probative value of the video recording suspect. Nevertheless, these were matters for the jury to consider when deciding what inference to draw, if any, from the concealed evidence. As in many cases involving spoliation, we cannot say with precision how much the video recording "weighed in [Toyota's] favor." (*Cedars-Sinai*, *supra*, 18 Cal.4th at p. 14.)

Regarding Zubin's undue prejudice claim, the court conducted a balancing test under Evidence Code section 352 and determined, in its discretion, to limit Toyota's presentation of the vehicle inspection incident to one witness. In this manner, the jury would hear of the incident, yet there was minimal risk the jury would become emotionally biased against Zubin. (See *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008 ["prejudice" as the term is used in § 352 applies to evidence that uniquely tends to evoke

an emotional bias against the defendant and has very little effect on the issues].) We discern no abuse of discretion. The court did not err in denying motion in limine No. 7.

III. *Zubin's Request for a Trial Continuance*

Trial was set for September 27, 2016. On September 23, 2016, Zubin's counsel requested a trial continuance based on his argument that counsel for Toyota had provided him with defective trial exhibits—that is, exhibits without labels or page numbers—on September 21, at the parties' "advance trial review" meeting. The record contains sworn declarations from Toyota's counsel explaining that the parties were still trying to consolidate the final exhibits at the advance trial review meeting and that a notebook of labeled and paginated defense trial exhibits was served on Zubin's counsel on September 23. Toyota's counsel declared that Toyota's trial exhibits were composed of documents produced in discovery.

At the very start of trial on September 27, the court stated on the record that it had reviewed Zubin's motion for a continuance and was denying it. The court remarked that it was at that moment looking at a three-ring notebook of trial exhibits with a jointly prepared exhibit list, and Toyota represented that the same had been delivered to Zubin's counsel. To address Zubin's concerns regarding new exhibits, the court ordered that (1) any exhibits not exchanged by then would not be permitted to be introduced in evidence and (2) any exhibits in the notebook allegedly not produced during discovery would be ruled on during trial if and when the party sought to present the exhibit to the jury.

On appeal, Zubin asserts that Toyota tried to "sabotage" his case by providing him with allegedly defective trial exhibits, which contained documents not previously produced. He claims the trial court should have granted him a continuance.

"Trial continuances are disfavored and may be granted only on an affirmative showing of good cause." (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1127; Cal. Rules of Court, rule 3.1332(c).) " 'The decision to grant or deny a continuance is committed to the sound discretion of the trial court. [Citation.] The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record.' " (*Thurman*, at p. 1126.)

We find no abuse of discretion in the trial court's denial of a continuance. The record supports a finding that Toyota tried in good faith to comply with the court's advance trial review order, and it is undisputed that Zubin had a complete set of exhibits prior to trial. If a party sought to introduce an exhibit that was allegedly not produced during discovery, the court intended to rule on the issue as trial proceeded. Having alleviated Zubin's concerns, there was no need for a continuance. (See Cal. Rules of Court, rule 3.1332(d) [trial court may consider whether there are "alternative means to address the problem that gave rise to the motion" for continuance when ruling on the motion].)

IV. *Instructional Issue on Section 1793.2, Subdivision (b) Claim*

Zubin argues the trial court prejudicially erred in failing to instruct the jury on his second cause of action. As we explain, assuming the court erred in failing to provide the relevant instruction, we conclude the error was not prejudicial.

A. *Further Background*

Zubin's complaint alleged two causes of action under section 1793.2: (1) failure to repair the vehicle's defects after a reasonable number of attempts (subdivision (d) claim); and (2) failure to complete repairs within 30 days (subdivision (b) claim). His complaint sought the same remedies under both claims.

After Zubin presented his case-in-chief at trial, Toyota filed an "issue brief" requesting the court not to instruct the jury with CACI No. 3205 on Zubin's subdivision (b) claim. CACI No. 3205 provides in pertinent part:

> "[*Name of plaintiff*] claims that [he/she] was harmed because [*name of defendant*] failed to [begin repairs on the [*consumer good/new motor vehicle*] in a reasonable time/ [or] repair the [*consumer good/new motor vehicle*] within 30 days]. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] . . . [¶]
>
> "4. That [*name of defendant*] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] complete repairs within 30 days so as to conform to the applicable warranties]."

The crux of Toyota's briefed argument was that subdivision *(b)* did not apply to manufacturers of new motor vehicles and that Zubin could only obtain the "restitution or replacement" remedy under subdivision *(d)* of section 1793.2, which gives a manufacturer of motor vehicles a "reasonable number of attempts" to conform the vehicle to warranty.

Subsequently, with counsel present, the trial court reviewed the jury instructions it was preparing to give (or not) and explained its rationale. The court expressed it did not believe CACI No. 3205 applied in this case as briefed by Toyota, and the more appropriate remedial provision applicable to new motor vehicles was the one outlined under subdivision (d) of section 1793.2. The court accordingly declined to give CACI No. 3205 pertaining to Zubin's subdivision (b) claim. The court also questioned Zubin's counsel on whether there had been any evidence presented showing that Zubin was entitled to incidental damages under section 1793.2. Counsel responded that Zubin was "not going to be making a claim for incidental damages above restitution," that is, he only sought restitution for "the buyback of the car." Accordingly, as far as damages, the jury was only instructed on the issue of restitution (CACI No. 3241). The court further instructed the jury on civil penalties under the Song-Beverly Act (CACI No. 3244).

B. *Parties' Contentions*

On appeal, Zubin argues the jury should have been instructed on CACI No. 3205 because it is applicable to new motor vehicles. Toyota implicitly concedes that CACI No. 3205 applies to motor vehicles, but argues there was insufficient evidence that Zubin's vehicle was not serviced or repaired to conform to warranty within 30 days after he presented it to the dealer. Toyota also maintains that the failure to instruct was harmless because Zubin was required to prove a violation of section 1793.2, subdivision (d) in order to obtain his requested remedy of restitution or replacement.

C. *Standard of Review*

"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.) "We independently review claims of instructional error viewing the evidence in the light most favorable to the appellant." (*Ibid.*)

"[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' " (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [erroneously excluded instruction does not result in automatic reversal nor does it violate the right to jury trial].) "In a civil case an instructional error is prejudicial reversible error only if it is reasonably probable the appellant would have received a more favorable result in the absence of the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; [citations].) 'This determination depends heavily on the particular nature of the error, and its effect on the appellant's ability to place his or her full case before the jury. Actual prejudice must be assessed in the context of the [entire] trial record[.]' " (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1248-1249, italics omitted.)

D. *Section 1793.2*

"Section 1793.2 incorporates several aspects of the [Song-Beverly] Act's comprehensive regulation of express warranties for consumer goods. This statute requires manufacturers of consumer goods sold in California to arrange for sufficient service and repair facilities to carry out the terms of warranties (§ 1793.2, subd. (a)); it sets a time limit for the repair of consumer goods (§ 1793.2, subd. (b)); it delineates rules for delivering nonconforming goods for service and repair (§ 1793.2, subd. (c)); and it requires a manufacturer to replace the consumer good or reimburse the buyer if the manufacturer or its representative is unable to repair the consumer good after a reasonable number of attempts (§ 1793.2, subd. (d))." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1077-1078.)

"Section 1793.2, subdivision (d)—the replace-or-refund provision of the Act—consists of two parts or paragraphs, one for consumer goods in general (§ 1793.2, subd. (d)(1)) and one strictly for new motor vehicles (§ 1793.2, subd. (d)(2)). [S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement (subd. (d)(2)(A)) and in the case of restitution (subd. (d)(2)(B)); and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle in the case of both replacement and restitution (subd. (d)(2)(C)). These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who

purchase other consumer goods under warranty." (*National R.V., Inc.*, *supra*, 34 Cal.App.4th at pp. 1078-1079, internal fns. omitted.)

In *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1263 (*Gavaldon*), our Supreme Court concluded that "the replacement/restitution remedy applies only if the conditions of section 1793.2[, subdivision](d) are met." In *Gavaldon*, the plaintiff argued that the service contract she purchased on her minivan was the equivalent of an express warranty for purposes of obtaining replacement/restitution and that, even if it was not an express warranty, she was still entitled under section 1794[15] to obtain the replacement/restitution remedy. (*Gavaldon*, at pp. 1255, 1262.) The court held that the plaintiff was not entitled to the replacement/restitution remedy because that remedy is only available to consumers who strictly meet the conditions of subdivision (d) of section 1793.2. (*Gavaldon*, at p. 1262.) "The right to replacement or restitution [as referenced in § 1794] is qualified by the phrase 'as set forth in subdivision (d) of Section 1793.2.' It is most reasonable to assume that this qualification means that the remedy is subject to the provisions set forth in section 1793.2, subdivision (d) . . . otherwise the reference to section 1793.2(d) would be superfluous." (*Ibid.*) Thus, manufacturers of motor vehicles

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15 Section 1794 states in pertinent part that "(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief. [¶] (b) The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2."

have "a reasonable number of attempts" to service or repair the vehicle to conform to an express warranty before the consumer is entitled to restitution. (*Ibid.*; § 1793.2, subd. (d)(2).)

E. *Analysis of Failure to Instruct on Subdivision (b) Claim*

Based on well-established law, we accept Toyota's implicit concession on appeal that section 1793.2, subdivision (b) applies to manufacturers of motor vehicles. Further, there appears in the record sufficient evidence to support a jury instruction on Zubin's subdivision (b) claim.[16] The question before us then is whether the failure to instruct was prejudicial. We conclude, based on the context of the entire trial record, that the instructional error was not prejudicial.

After presenting evidence in support of his claims, the only damages Zubin sought under section 1793.2 was restitution. He withdrew his claim for incidental or consequential damages based on an insufficient evidentiary showing. It was necessary for him to establish a violation of section 1793.2, subdivision (d) to obtain restitution. (*Gavaldon*, *supra*, 32 Cal.4th at p. 1263.) As a result, even if the jury had been instructed on and found a violation of the subdivision (b) claim, it is not reasonably probable that Zubin would have obtained a more favorable outcome because the jury did not find a violation of section 1793.2, subdivision *(d)*. Instead, in its special verdict the jury found

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16 Toyota argues on appeal that the 30-day time limit for repairs means that a vehicle may not be out for repairs/service for more than 30 days on a single visit or means 30 nonconsecutive days. Although not necessary to our resolution of this case, we note that Toyota's reading of the statute does not appear consistent with the statute's plain language or legislative intent.

Toyota had repaired the vehicle to conform to warranty after a reasonable number of opportunities *and* there was no breach of implied warranty.

Further, we do not find it reasonably probable that Zubin would have obtained civil penalties based on a violation of section 1793.2, subdivision (b). Under the Song-Beverly Act, an award of civil penalties requires a manufacturer's willful violation of its obligations, which is normally a factual question for the jury. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104; § 1794, subd. (c).) " '[A] a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund.' " (*Oregel,* at p. 1104.)

Here, the jury apparently credited Toyota's defense and mostly discredited Zubin's account of the vehicle's issues since the jury did not find a violation of or award civil penalties on the subdivision (d) claim. Toyota's witnesses explained the great lengths Toyota went through to try and diagnose and/or replicate Zubin's reported issues prior to any suspicion of tampering. Toyota had a difficult time initiating and/or completing repairs because the vehicle always operated normally while in the shop. Toyota relied on the diagnostic trouble codes to guide its replacement of parts until, of course, it observed the codes' recurrence even after the parts were replaced.—This, in turn, led to suspicions of tampering. Importantly, Zubin's own expert (as well as Toyota's team of experts) could not replicate the reported issues or find any problems with the vehicle. Thus, on

this record, even if the jury had been instructed on the subdivision (b) claim, we are not convinced the jury would have found a willful violation. Also, as we have discussed, without proving a violation of section 1793.2, subdivision (d), Zubin could not have obtained restitution based solely on a violation of subdivision (b). He has failed to establish prejudicial reversible error.[17]

V. *The Court's Response to a Jury Question Regarding Witness Testimony*

Right after the jury retired for deliberations, the trial court informed the parties of its policy for handling jury questions, as follows:

> "THE COURT: [I]f we do get a question, it's not my policy to require that you be present. The [c]ourt prefers that you be present. So—but on that, you can be—you can appear telephonically. But, of course—and then it's up to you, also, if you want to be present for the verdict.
>
> "Once we—and I'm going to direct that each of you give numbers that my clerk can reach you in case we do have a question or to let you know when the verdict comes in.
>
> "How far away from the court will you be?
>
> "[Zubin's counsel]: About 30 minutes.
>
> "THE COURT: All right. Now, we're not going to wait 30 minutes for you to come downtown to answer questions. So if you're not

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17 Zubin argues in his reply brief that he could recover damages for a violation of section 1793.2, subdivision (b) under Commercial Code section 2711, on a theory that he elected to cancel the sale. The sale cancellation theory was not presented at trial, and we may not entertain it now. (*Gavaldon, supra*, 32 Cal.4th at p. 1264.) Further, that theory of damages would not apply under the circumstances since the jury found the vehicle was successfully repaired to conform to the express warranty after a reasonable number of attempts. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 407; CACI No. 3205, directions for use.)

> downtown, you'll need to make sure you get access to a phone right away. Now, 30 minutes maximum for the verdict.
>
> "How about you? How far will you be away?
>
> "[Toyota's counsel]: Five minutes.
>
> "THE COURT: All right. So that's a lot more manageable. Again, it's up to you whether you want to come into court or get on the phone.
>
> "Now, if you do choose to be on the telephone, each of you are entitled to a copy of whatever question we get . . . from the jury. The next time you come back in to court, if you have appeared telephonically, just let my clerk know and we'll make sure that we get a copy for you of the questions.
>
> "Once we've conferred and we've developed an answer, then I provide it to my clerk, she memorializes it in correct form, and my deputy brings it back."

Later, during deliberations, the jury asked the court the following question: "Is it in the testimony and can we see it as to why he (Mr. Zubin) stopped driving the car[?]"

The appellate record contains no reporter's transcript of a conference between the court and counsel regarding how to respond to the question. According to a declaration submitted after the fact by Toyota's counsel, neither Toyota's counsel nor the court had a specific memory of whether there was testimony by Zubin as inquired by the jury. Zubin's counsel did not submit a declaration on what occurred during the conference. The court responded to the jury, "The Court will, if requested, arrange for the entire testimony of Mr. Zubin to be read back to you by the court reporter." The jury did not request a readback of Zubin's entire testimony prior to returning its verdict.

Zubin claims the court failed to comply with Code of Civil Procedure section 614 and prejudicially erred in refusing to read back a "part" of his testimony, i.e., several lines of Zubin's direct examination testimony, which he asserts could have been found by the court reporter "within minutes."[18]

We conclude that Zubin has failed to establish trial court error. As the appellant, he "has a duty to provide an adequate record on appeal to support his claim of error. [Citation.] In the absence of an adequate record, the judgment is presumed correct. [Citation.] 'All intendments and presumptions are made to support the judgment on matters as to which the record is silent.' " (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1507.) Here, based on the court's conversation with counsel immediately after the jury retired for deliberations, we may reasonably presume that the court followed its stated procedures, Zubin's counsel was notified of the jury's question, and he did not object to the court's proposed response. Having failed to object, his claim of error is forfeited.[19] (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.)

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18 At oral argument, Zubin's counsel asserted that responsive lines of Zubin's testimony were, in fact, found by the court reporter during the conference within 10 minutes. However, no reporter's transcript, clerk's transcript, settled statement, minute order, or declaration supports this assertion.

19 At oral argument, Zubin's counsel stated that he objected to the court's proposed response but admitted there is no record of any objection. As we have indicated, there is no reporter's transcript of the conference. Furthermore, considering the specific lines of Zubin's testimony he claims should have been read to the jury, we are unpersuaded any prejudice occurred:

"Q. Why did you stop driving [the vehicle]?

Even assuming the claim is properly before us, the court did not err. "Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. [Citation.] If they ask for testimony relating to a specified subject, they are entitled to hear all of it. [Citations.] However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman." (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365-366; *Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 712-713 (*Asplund*).)

Asplund is instructive. The Court of Appeal found no trial court error based on the following facts:

> "[T]he jury had deliberated for approximately four hours, it returned to the court and through its foreman asked that that portion of Driskell's testimony covering the crane operation just before, during and after the accident be read. A substitute reporter had reported that portion of the trial. He was not then available. Other testimony requested was read to the jury. A search was then made for the missing reporter, but he still could not be found. Later that evening, the judge had the jury returned to the courtroom. The circumstances were explained and the judge asked: 'Mr. Foreman, do you feel from your discussions that it is possible that you might resolve this problem by further discussion amongst yourselves as to the testimony?' The foreman replied he thought it was possible. The

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> "A. I was -- at the time I worry -- I was, like, afraid to drive because I never knew what happened, you know, the day when I'm going to drive. I do not know what to expect from the vehicle."

We do not find it reasonably probable that Zubin would have obtained a more favorable result if this testimony had been read to the jury in response to its question.

request for the reading of the testimony was not renewed." (*Asplund*, *supra*, 225 Cal.App.2d at pp. 712-713.)

In this case, the jury asked to see Zubin's testimony as to why he "stopped driving the car." The court did not recall whether Zubin had specifically testified to that point and was concerned about reading an incomplete portion of his testimony. Contrary to Zubin's assertion on appeal, there is no record of anyone contemporaneously locating or directing the trial court's attention to specified lines of Zubin's testimony. Moreover, the jury's question was broad and nonspecific as to timing. Arguably, Zubin "stopped driving the car" at certain points in time for different reasons and he may have stopped driving the car altogether due to the vehicle's entire service and repair history. Thus, the court offered to have his entire testimony read back to the jury if it requested. Zubin has failed to establish trial court error.

VI. *The Court's Denial of Zubin's Motion for Judgment Notwithstanding the Verdict*

Zubin claims the court erred in denying his motion for JNOV because undisputed evidence established his cause of action under section 1793.2, subdivision (d). He specifically argues the jury must have rejected Toyota's tampering defense because it found that the vehicle suffered from a covered defect and that Toyota's eight repair attempts were a "reasonable" number of attempts as a matter of law.

In response, Toyota contends that Zubin forfeited his claim because his appellate brief fails to set forth a sufficient statement of facts and, in any event, the evidence amply supports the jury's verdict. We agree with Toyota's position.

Zubin's opening brief on appeal contains a two-page statement of facts that does not adequately summarize the material facts with citations to the record. On this basis alone, his claim fails. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53; see also *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [failure to provide record citations may waive the issue]; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C) [appellants must provide record citations and citation to authority].)

On the merits, Zubin's claim also fails. We review an order denying a motion for JNOV for "whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) Here, substantial evidence supports both that the vehicle suffered from a covered defect *and* that a covered defect was reasonably repaired consistent with Toyota's tampering defense. For example, the jury could have found that there was a nonconforming throttle body between the second and third service visits, which Toyota brought to conformity by the third visit. At the same time, the jury could have believed that Toyota's number of repair attempts was reasonable due to improper interference by Zubin. There was no inconsistency between the jury's findings and its acceptance of Toyota's defensive theory.

Additionally, we reject Zubin's argument that the vehicle's service history showed as a matter of law that Toyota was unable to repair the defect after a reasonable number of attempts. Under section 1793.2, subdivision (d), the "reasonableness of the number of repair attempts is a question of fact to be determined in light of the circumstances . . ." (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785,

799 [reviewing jury's determination for substantial evidence]; see also *Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1209 ["A trier of fact might determine that two or three or more attempts were reasonable under the circumstances of a case or were unreasonable under those circumstances."].)

Under the circumstances of this case, when there was substantial evidence that Zubin improperly interfered with Toyota's diagnostic attempts, the trial court had no basis to determine the reasonableness of the number of repair attempts as a matter of law or direct a verdict in Zubin's favor.[20]

DISPOSITION

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

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

COURT OF APPEAL * FOURTH APPELLATE DISTRICT * STATE OF CALIFORNIA

04/15/2019

KEVIN J. LANE, CLERK

By Rita Rodriguez Deputy Clerk

20 Section 1793.22, subdivision (b) creates a presumption that a reasonable number of attempts have been made under certain circumstances. Zubin does not contend that the presumption applied in this case.