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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GUSTAVO VEGA, Plaintiff and Appellant, v. CARMAX AUTO SUPERSTORES CALIFORNIA, LLC et al., Defendants and Respondents.	B278249 (Los Angeles County Super. Ct. No. BC577124)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Doumanian & Associates, Nancy P. Doumanian, Ankineh Zadoorian; Law Offices of Robert Dourian, Robert Dourian and Z. Sondra Derderian for Plaintiff and Appellant.

Simon Greenstone Panatier Bartlett and Brian P. Barrow for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Schlichter & Shonack, Kurt A. Schlichter, Steven C. Shonack, William A. Percy, Kim Tabin Mann and Heather DeFalco for Defendants and Respondents.

SUMMARY

Plaintiff Gustavo Vega sued defendants CarMax Auto Superstores California, LLC and its sales associate, Mauricio Trelles, in connection with defendants' sale of a used car to plaintiff's mother for use by plaintiff (who was then 17). Three months after plaintiff's mother bought the car, plaintiff had an accident, the likely cause of which was a faulty actuator and throttle body assembly. CarMax reimbursed plaintiff's mother for the car after she gave notice to CarMax under the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.).

Plaintiff's lawsuit alleged five causes of action for fraud, negligence and violation of the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.) and the CLRA. The core of his claim was that defendants concealed their failure to perform a rigorous inspection of the car, while telling plaintiff and his mother the car had passed such an inspection. Defendants demurred to the initial, first and second amended complaints, and the trial court sustained the last demurrer without leave to amend, principally on the ground plaintiff had no standing to complain because he did not purchase the car.

We affirm the judgment.

FACTS

1. The Second Amended Complaint

The operative complaint alleges the following facts.

In December 2012, defendant CarMax purchased a 2006 Ford Mustang from its then-owner, at CarMax's Burbank location. When the owner brought the car to CarMax, its employees "visually observe[d] the condition of its bumpers, body, paint, windows, hood, roof, tires and wheel," and saw no visible damage to its exterior body. They "checked the condition of the

vehicle's front, rear seats, carpeting, listened to the engine, checked the transmission, and determined these were in good condition." They checked various data bases "to determine if the vehicle was previously stolen, salvaged, if the odometer reading was accurate, or if the vehicle was subject to any liens." There were no adverse results.

CarMax employees deemed the car to be well maintained. CarMax purchased the car from its owner for $13,000, "[w]ithout any certified automobile mechanic's inspection," and "without any '125 Point' or 'Rigorous' vehicle inspection." (This refers to CarMax's practice, when selling a car, to provide the buyer with a certificate stating, "This is to certify that this vehicle has passed the rigorous CarMax Certified Quality Inspection," and stating "[w]e check over 125 points," which are listed in the certificate.) The owner warranted and represented to CarMax in the purchase agreement that the car, among other things, had not suffered frame damage, "had no known accident or body damage" and was "free from mechanical problems." CarMax "relied upon [these] representations [the owner] made" about the car.

According to the complaint, after purchasing the car from the prior owner, CarMax "never performed a 'Rigorous 125-Point Quality Inspection' on the vehicle," and instead made the car "available for sale to the public at CarMax's 'No-Haggle Price' of $17,799.00."

On January 14, 2013, the car was on display at CarMax's Duarte location. Plaintiff and his mother went there that day, and defendant Trelles assisted them. Plaintiff "was the primary person involved in the shopping, discussions or negotiations with CarMax and the decision to purchase a car that day, was primarily plaintiff's decision."

Mr. Trelles "expressly responded to questions asked by plaintiff and his mother" about the car, stating that the car " 'was never involved in any prior accidents' "; " 'passed a rigorous 125 point Quality inspection by CarMax's mechanics' and that it was 'certified' "; and that " 'if the vehicle had any prior collisions or accidents, or any history of mechanical problems, CarMax would never accept it into its inventory of used cars.' " (Italics omitted.)

Plaintiff and his mother had also been previously exposed to CarMax advertising campaigns informing the public "that CarMax only sold used cars that were 'certified' and that any vehicle which became part of CarMax's inventory of used cars, had to pass a 'rigorous' 125 point safety inspection, and that any used car with prior collisions or mechanical or electronic defects would be vetted by CarMax's trained mechanics and would not qualify to become part of CarMax's inventory of used vehicles."

Relying on CarMax's representations, "plaintiff decided this was the car he wanted. With low miles, no prior accidents, backed by CarMax's rigorous 125 point inspection program, he asked his mother to purchase the 2006 Ford Mustang for him. Also relying upon these same representations, [plaintiff's mother] felt comfortable with her son's decision, and readily complied with his request and purchased this vehicle for him."

Plaintiff took possession of the car on January 14, 2013, and drove it without incident for three months. Then, on April 16, 2013, the car "suddenly, and without warning, began malfunctioning and accelerated on its own." Plaintiff was unable to control the car and it crashed into a curb, "causing substantial property damage, and bodily injury to plaintiff."

A week later, the car was towed to a body shop, where an inspection revealed it was involved in "a substantial front-end collision before it was sold by CarMax on January 14, 2013. The body shop discovered evidence of changes in the vehicle's paint and an 'overspraying of paint' at certain areas, including . . . the headlight areas of the body, around the condenser unit, and other parts of the car. Further evidence of a prior collision became evident as [the shop's] inspection revealed evidence of replaced non-factory components and parts." Plaintiff was also informed that "certain mechanical or electronic problems existed with the vehicle."

The car was then taken to the service department of a Ford dealership for evaluation, including "to determine if there was any defect with the throttle assembly." There, a "system diagnosis on the vehicle . . . discovered a faulty actuator and delayed response to the throttle body assembly." (Italics omitted.) The Ford dealership informed plaintiff "that the most likely cause of his vehicle's sudden acceleration . . . was its faulty actuator and throttle body assembly, as well as the vehicle's previous collision and front end damage." (Italics omitted.) A declaration from a Ford employee incorporated in the complaint stated that if CarMax had performed a safety inspection, "it should have detected, and discovered the problem with the throttle body assembly, and the throttle body assembly should have been replaced at that time."

After repairs were completed, the car was returned to CarMax, "who then regained title . . . and reimbursed plaintiff's mother for its purchase, following her written notice to CarMax under the [CLRA] to resolve her economic damages claims . . . ."

Plaintiff filed this lawsuit on March 30, 2015. The operative second amended complaint alleges five causes of action: fraud-concealment, fraud-negligent misrepresentation, negligence, violation of the UCL and CLRA violations. All the causes of action allege defendants either intentionally or negligently misrepresented that CarMax performed a rigorous 125-point quality inspection of the car and that the car had no accidents or mechanical issues, to induce plaintiff to ask his mother to buy the car for him.

In addition to compensatory damages, plaintiff sought attorney fees, equitable and injunctive relief, and punitive damages.

2. The Demurrer and the Trial Court's Ruling

Defendants demurred to the second amended complaint (as they had to the two prior versions), and also filed a motion to strike portions of the complaint, including those seeking attorney fees and punitive damages.

The trial court sustained the demurrer without leave to amend. The court found that defendants had no duty of disclosure to plaintiff, who did not purchase the vehicle, and that plaintiff did not have standing to assert his claims. The court also found insufficient allegations identifying the damages, and no allegations defendants knew of a specific defect and concealed that knowledge.

Judgment of dismissal was entered on September 20, 2016, and this appeal followed. We granted an application from the Consumer Attorneys of California to file an amicus curiae brief in support of plaintiff.

DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Ibid.*) Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action. (*Ibid.*)

The fundamental flaw in plaintiff's complaint is the one identified by the trial court. Plaintiff cannot successfully plead any of his claims because he was not the party who bought the car. "It is axiomatic" that a plaintiff "must allege [he] 'actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of [his] conduct which alter[ed] [his] legal relations," and that without such representation, "[he] would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Schauer v. Mandarin Gems of California, Inc.* (2005) 125 Cal.App.4th 949, 960 (*Schauer*).) Here, plaintiff did not enter into any transaction with defendants. In the absence of any purchase or other transaction, and in the absence of any legal authority suggesting defendants in these circumstances have duties to persons other than those

with whom they transact business, we can find no legal basis for plaintiff's claims.

We address plaintiff's causes of action in the order he asserted them.

1. The Fraud Claims

a. Fraudulent concealment

The elements of fraud are a misrepresentation (false representation, concealment or nondisclosure), knowledge of falsity (scienter), intent to defraud ("i.e, to induce reliance"), justifiable reliance, and resulting damage. (9 Witkin, Summary of Cal. Law (2018) Torts, § 890.) More specifically, " '[t]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " (*Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157-158.) Fraud, including fraud by concealment, must be pled with specificity. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.)

As we have observed, *Schauer* demonstrates that a plaintiff who is not party to the underlying business transaction cannot recover for fraud based on that transaction. In *Schauer*, the plaintiff's then-fiancé and later ex-husband bought her an engagement ring from defendant for over $43,000, based on a

clarity rating and appraised value that the plaintiff later (after the divorce) discovered were much different from its true clarity and actual worth. (*Schauer, supra,* 125 Cal.App.4th at p. 953.) On appeal from a judgment of dismissal, the court found the plaintiff "[had] standing as a third party beneficiary of the sales contract" to proceed on her contract claim for breach of warranty, but in all other respects – including claims of fraud and CLRA violations – her pleading was defective and she was "without standing to recover under any legal theory alleged." (*Id.* at pp. 952-953, 956.)

Specifically, *Schauer* stated: "[T]he absence of an assignment of rights from [the plaintiff's ex-husband] precludes plaintiff from maintaining a cause of action for actual fraud." (*Schauer, supra,* 125 Cal.App.4th at p. 960.) The court then pointed out, as indicated above, that it was "axiomatic" that the plaintiff had to allege, among other points, that the misrepresentation was an immediate cause of her conduct " ' "which alter[ed] [her] legal relations." ' " (*Ibid.*) The court concluded that it was the plaintiff's ex-husband who "allegedly relied on the representation and entered into the contract of sale. [H]e retained the right, if any, to sue for actual fraud." (*Ibid.*; see also *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1525, 1529, 1530, 1531 (*MEGA Life*) [real party in interest could not recover on his individual tort claim for fraud based on the issuance of a health insurance policy by the insurer to his deceased wife; real party "cannot establish the necessary element of legal reliance"; assuming, arguendo, the alleged misrepresentations or concealments were directed at real party as well as his wife, "[t]he fatal difficulty is that [real party] was a stranger to the insurance contract, and any reliance by him

could not have caused *him* to 'alter his position to his injury or risk' "; he "did *not* change his legal position to his detriment"].)

Plaintiff claims – mistakenly – that, "[u]nlike the plaintiff in *Schauer*, here [plaintiff] was present with his mother at the CarMax lot when misrepresentations were made about the safety and reliability of the vehicle to be purchased." Plaintiff continues, stating he "was responsible for the decision to purchase this used vehicle." But the very same thing happened in *Schauer*. The plaintiff and her ex-husband "went shopping for an engagement ring"; "were together when plaintiff chose the ring she wanted or, as alleged in the complaint, she 'caused [the ring] to be purchased for her' "; and her ex-husband "bought the ring 'for the sole and *stated* purpose of giving [the ring]' to plaintiff." (*Schauer, supra,* 125 Cal.App.4th at p. 958.)

In short, we see no pertinent distinction between *Schauer* and this case, and plaintiff offers none.

Next, plaintiff cites *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066 (*Randi W.*), as "compelling authority" that he may plead his fraud claims "by alleging [defendants] concealed and misrepresented facts to a third party," his mother, who purchased the car. We think not.

In *Randi W.*, the Supreme Court concluded "that defendants' letters of recommendation, containing unreserved and unconditional praise for [a] former employee . . . despite defendants' alleged knowledge of complaints or charges of his sexual misconduct with students, constituted misleading statements that could form the basis for tort liability for fraud or negligent misrepresentation. Although policy considerations dictate that ordinarily a recommending employer should not be held accountable to third persons for failing to disclose negative

information regarding a former employee, nonetheless liability may be imposed if, as alleged here, the recommendation letter amounts to an *affirmative misrepresentation* presenting a foreseeable and substantial risk of physical harm to a third person." (*Randi W., supra,* 14 Cal.4th at p. 1070; see *id.* at p. 1081 ["we hold . . . that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons"].)

Plaintiff's reliance on *Randi W.* is misplaced. In *Randi W.*, the defendants were alleged to have known of their former employee's sexual misconduct with students, and yet recommended him with "unreserved and unconditional praise," after which another school district hired him and he sexually assaulted the plaintiff, a 13-year-old student. (*Randi W., supra,* 14 Cal.4th at p. 1070.) This case has no similarity to *Randi W.*

Unlike *Randi W.*, this is the "ordinar[]y" case, where alleged failure to disclose negative information should not and does not result in liability to a third party. This is not a case of "[o]ne of society's highest priorities" where "the law certainly recognizes a *policy of preventing future harm* of the kind alleged here." (*Randi W., supra,* 14 Cal.4th at pp. 1078-1079 ["One of society's highest priorities is to protect children from sexual or physical abuse."].) This is not a case where plaintiff alleges defendants knew of a specific defect in the car that presented a foreseeable and substantial risk of physical harm to anyone driving the car.

To the contrary, this is a case alleging defendants failed to tell plaintiff that they did not perform the kind of inspection they said they had performed. The only "affirmative misrepresentations" plaintiff alleges are those by defendant Trelles, to the effect that the car had no prior accidents and passed a rigorous 125-point inspection, or otherwise would not be in CarMax's inventory of cars. This is in no way comparable to failing to disclose an employee's known history of sexual assault on students while showering him with "unconditional praise."

In short, in the absence of any allegation that defendants knew of the defect in the actuator and throttle assembly – and there was none – plaintiff's allegations are simply not the sort that can generate tort liability to a third person for fraud or negligent misrepresentation. The circumstances here are far removed from those in *Randi W.*, and we see no justification for extending the *Randi W.* principle to the substantially different context alleged in plaintiff's complaint.

Plaintiff also devotes several pages of briefing to a description of cases in different factual scenarios, where the courts have applied the principle that a defendant "will not escape liability if he makes a misrepresentation to one person *intending* that it be repeated and acted upon by the plaintiff," and "if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class." (*Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605, 608-609 [seller of real property may be liable to a subsequent purchaser for "indirect fraud" where it was alleged he misrepresented or failed to disclose known material facts about soil subsidence and structural problems to his immediate purchaser, and "either

intended or expected that the misrepresentations would be repeated and/or the nondisclosures be transmitted to plaintiffs"].)

We do not disagree with the principles stated, but we see no conceivable relevance to this case. This is not a case involving repeated misrepresentations or subsequent purchasers. Plaintiff was never a party to any transaction, either at the time of the alleged misrepresentations or later, in which he "change[d] his legal position to his detriment." (*MEGA Life, supra,* 172 Cal.App.4th at p. 1531.)

b. Negligent misrepresentation

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) "[A] positive assertion is required; an omission or an implied assertion or representation is not sufficient." (*Ibid.*)

Plaintiff's complaint is fatally defective for the reasons we have discussed in connection with his fraudulent concealment claim: he was not a party to the purchase transaction and so was not the object of, and did not and could not have relied on, defendant Trelles's alleged misrepresentations. Plaintiff presents no contentions and cites no authorities other than those in support of his fraudulent concealment claim, and we have found those to be without merit.

2. The Negligence Claim

Plaintiff's claim of negligence alleged defendants "had a duty to exercise reasonable and ordinary care in operation of its

business," and "a duty to cause [plaintiff] no harm," including a duty to undertake "a reasonable inspection" of the vehicle "by qualified mechanics or technicians." "The acts and omissions of defendants . . . in the operation of their business and in the sale of the subject vehicle, was careless, and negligent, and . . . defendants thereby breached the . . . duty to exercise reasonable and ordinary care."

On appeal, plaintiff makes a one-page argument, telling us three times that "[n]egligence is sufficiently pled," because it was "reasonably foreseeable" that "by engaging in fraudulent business practices, unsafe and defective used cars would be sold to [CarMax's] customers," and that "someone would get hurt" if they certified used cars as having passed an inspection "without actually having qualified mechanics do them." Plaintiff fails to explain why defendants' duty of due care in the operation of their business should be extended to him in the absence of any business transaction between them. He merely recites section 311 of the Restatement Second of Torts (on negligent misrepresentation involving risk of physical harm), and tells us that the "same arguments . . . supporting the Fraud-Concealment count . . . relating to duty to disclose, apply to this count." Since those arguments are unavailing (see pt. 1, *ante*), little more need be said.

In any event, we see no basis for finding defendants owed a duty of due care "in the operation of their business and in the sale of the subject vehicle" to a person with whom they transacted no business. As the trial court pointed out, plaintiff has "identifie[d] no legal basis to impose a duty on the Defendants with regard[] to the Plaintiff," as he made no allegations that tethered his "vague allegation" of duty "to an

injury that was reasonably foreseeable to arise from the negligent operation of the business."

3. The UCL Claim

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' (§ 17200.)" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) Plaintiff contends on appeal that his lawsuit "lists a number of unlawful practices . . . CarMax engaged in," including misleading the public about its 125-point inspection program and similar allegations already described at length. Plaintiff also points to the complaint's allegations that CarMax violated Vehicle Code section 11713.18, which makes it unlawful for a dealer to advertise a used vehicle as " 'certified' " to meet the terms of a used vehicle certification program if certain conditions apply. Thus a dealer cannot use the term "certified" if the car has sustained damage in an impact that after repair "substantially impairs the use or safety of the vehicle," or if the dealer knows or should have known the vehicle sustained frame damage. (Veh. Code, § 11713.18, subd. (a)(4) & (5).) Vehicle Code section 11713.18 makes a violation of that section actionable under the CLRA and the UCL. (Veh. Code, § 11713.18, subd. (b).)

Plaintiff's UCL allegations fare no better than his other claims. The UCL allows an action for relief to be prosecuted "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) As the trial court pointed out, plaintiff's complaint did not allege in the UCL count that he "suffered injury in fact and lost money or property as a result of any act of the Defendants." Plaintiff simply requested an injunction and

equitable relief "[o]n behalf of the general public," and requested "a full restitution of all economic damages suffered by plaintiff[] as a result of defendants' unlawful practices."

On appeal, plaintiff points to his allegations of bodily injury (incorporated in the UCL count), to the effect that he "has been and in the future will be required to obtain health care services" and suffered other economic and noneconomic damages "in an as yet undetermined amount."

We need not decide whether plaintiff's claims that he "lost money" by virtue of unspecified medical expenses is a sufficient allegation of standing under the UCL; he must also allege he did so "as a result of" defendants' acts of unfair competition. (Bus. & Prof. Code, § 17204.) Plaintiff's claim fails for the same reasons his fraud claim fails. Where a claim is brought under the "unlawful" prong of the UCL and "the predicate unlawful conduct is misrepresentation," a plaintiff is required to plead actual reliance. (*Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1385; see also *Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1143 ["To satisfy the causation element 'under the "unlawful" prong of the UCL, in which the predicate unlawful conduct is based on misrepresentations,' a plaintiff 'must show actual reliance on the alleged misrepresentation, rather than a mere factual nexus between the business's conduct and the consumer's injury.' "].) As we have discussed in connection with plaintiff's fraud claims, it was plaintiff's mother who relied on the alleged misrepresentations by entering into the purchase transaction, not plaintiff. (See *Schauer, supra,* 125 Cal.App.4th at p. 960.) Consequently, plaintiff, as in *Schauer*, is "without standing to recover under any legal theory alleged." (*Id.* at p. 956.)

4. The CLRA Claim

That brings us to plaintiff's final claim. The CLRA makes unlawful certain "unfair methods of competition and unfair or deceptive acts or practices" that are "undertaken . . . in a transaction intended to result or that results in the sale or lease of goods or services to any consumer . . . ." (Civ. Code, § 1770, subd. (a).) A consumer is defined as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." (Civ. Code, § 1761, subd. (d).) The CLRA authorizes "[a]ny consumer who suffers any damage as a result of" acts or practices declared unlawful by section 1770 to bring an action for damages and other relief. (Civ. Code, § 1780, subd. (a).)

Plaintiff was not the consumer in this case, and as a consequence cannot pursue a claim under the plain language of the CLRA. Despite that plain language, plaintiff complains that the trial court "disregarded the fact that [he] was the intended owner, user and beneficiary of the vehicle transaction." Plaintiff cites no authority, and makes no reasoned argument, to support the implied assertion that this somehow transforms him into a "consumer" within the meaning of the statute. It does not.

Amicus curiae similarly urges that the trial court's reading of the statutory definition was "unduly narrow," and the statute is "more properly interpreted as defining a consumer as anyone seeking to acquire a good, and who makes the key choices based on a seller's factual representations about the good for sale." But that is not how the Legislature chose to define "consumer," and we need not cite the innumerable authorities telling us that courts do not construe statutes to add words and concepts that

are not there. The Legislature is at liberty to change the definition; we are not.

Schauer confirms our conclusion, rejecting the plaintiff's argument that she had remedies under the CLRA because she was a consumer: "Unfortunately for plaintiff, by statutory definition [her ex-husband] was the consumer because it was he who purchased the ring. [Citation.] Plaintiff's ownership of the ring was not acquired as a result of her own consumer transaction with defendant, and without an assignment of [her ex-husband's] rights, she does not fall within the parameters of consumer remedies under the [CLRA]." (*Schauer, supra,* 125 Cal.App.4th at p. 960.)[1]

In his reply brief, plaintiff cites the recent case of *Gutierrez v. CarMax Auto Superstores California* (2018) 19 Cal.App.5th 1234 (*Gutierrez*). In *Gutierrez*, the plaintiff alleged CarMax represented that the car she purchased passed a 125-point quality inspection (with " 'Brake lights' " as one of the specific points inspected), but failed to disclose a safety recall for a critical safety-related component of the car's braking system (its stop lamp switch). (*Id.* at p. 1238, 1261-1262.) On appeal, she contended those allegations adequately stated violations of the UCL and the CLRA. *Gutierrez* concluded the plaintiff's

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[1] On August 5, 2016, plaintiff's mother signed an affidavit assigning "any and all rights" against defendants "under the [CLRA]" to plaintiff. Plaintiff filed the assignment concurrently with his opposition to defendants' demurrer on August 8, 2016. The assignment refers only to the CLRA claim. As to that claim, the trial court found that any claim by plaintiff's mother was barred by the CLRA's three-year statute of limitations before she made the assignment. (Civ. Code, § 1783.)

allegations were "sufficient to plead the existence of a duty to disclose information about the safety recall on the ground CarMax made partial representations about the vehicle's braking and lighting systems and those representations were likely to mislead for want of communication of the facts about the recall." (*Gutierrez,* at pp. 1262-1263.)

Gutierrez does not assist plaintiff. The plaintiff in *Gutierrez* purchased the car (19 Cal.App.5th at p. 1238), so she was the consumer. Plaintiff here was not. That alone ends his claim. But in addition, the facts in *Gutierrez* that supported a duty to disclose are in marked contrast with the allegations in this case. The *Gutierrez* allegations were sufficient "to establish CarMax had a duty to disclose the existence of the recall and the fact that the [car's] stop lamp switch had not been replaced in accordance with the recall." (*Id.* at p. 1261.) Those allegations included that the stop lamp switch was "a critical safety-related component" of the braking system and it was unsafe to operate a car with a defective stop lamp switch. "Therefore, the complaint adequately alleges facts about the stop lamp switch that implicate safety concerns and would be important to the reasonable consumer considering whether to buy" the car. (*Id.* at pp. 1261-1262.)

This case does not involve a safety recall, and plaintiff does not allege that defendants knew of any defect in the actuator or throttle assembly. Indeed, plaintiff does not identify what point or points in the 125-point inspection certification would have revealed the defect if properly inspected. In short, while "a duty to disclose material safety concerns 'can be actionable' " in several situations under California law (*Gutierrez, supra,* 19 Cal.App.5th at p. 1260), the situation here – where the allegations are

essentially of failure to disclose an alleged failure to inspect, with no allegation CarMax knew of the claimed defect – is not one of them.

5. The Request for Leave to Amend

Plaintiff contends the trial court abused its discretion when it sustained defendants' demurrer without leave to amend. Because he has made no attempt to demonstrate how he could amend the complaint to cure its defects, no abuse of discretion is shown.[2]

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

ROGAN, J.[*]

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[2] Amicus curiae argues (quoting *Schauer, supra,* 125 Cal.App.4th at p. 958) that plaintiff's complaint " ' meets the test of demonstrating plaintiff's standing as a third party beneficiary to enforce the contract between [his mother] and [CarMax],' " and that under the facts plaintiff alleged, " '[he] is entitled to proceed with [his] contract claim against defendant . . . .' " We find this contention puzzling, as plaintiff has never sought to enforce or asserted any breach of his mother's contract with CarMax.

[*] Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.