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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JANET CASE et al., Plaintiffs and Appellants, v. AMERICAN HONDA MOTOR CO., INC. Defendant and Respondent.	B279468 (Los Angeles County Super. Ct. No. BC424169)

APPEAL from orders of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Reversed and remanded with instructions.

Esensten Law, Robert L. Esensten, Jordan S. Esensten for Plaintiff and Appellant.

Sidley Austin, Michael Mallow, Sean A. Commons, Michael B. Shortnacy, Rachel A. Straus; Lewis Brisbois Bisgaard & Smith and Eric Y. Kizirian for Defendant and Respondent.

INTRODUCTION

Plaintiffs Janet Case and Courtney Shararian appeal from the denial of a motion for class certification in this product liability lawsuit against American Honda Motor Co., Inc. (Honda). On behalf of a putative class of owners of certain Honda vehicles, plaintiffs alleged that the vehicles contained a common design defect that could cause the automatic transmission to prematurely fail; plaintiffs further alleged that Honda knew about the defect but failed to disclose it to consumers. In addition, plaintiffs alleged that Honda adopted an unofficial extended warranty program for transmission repair costs for complaining owners, but failed to disclose the program to consumers in violation of the Secret Warranty Law (Civ. Code § 1795.90 et seq.).

The trial court initially denied class certification as to plaintiffs' failure-to-disclose claims, but granted it as to the secret warranty claim. However, at the suggestion of Honda's counsel, the court agreed to reconsider the latter decision and, following additional briefing and argument, decertified that claim. The court found that plaintiffs failed to meet their burden to establish the existence of predominant common questions, in particular, the existence of a design defect common to all class vehicles that could be proven by common evidence. The court further concluded that plaintiffs had not established that their claims were typical of the class or that the proposed class trial would be manageable. In reconsidering the secret warranty claim, the court found that the same issues with lack of common evidence of a defect defeated that claim as well.

On appeal, plaintiffs argue that the trial court improperly analyzed the merits of their claims and required them to prove

the existence of the alleged transmission design defect. They assert that their theory of a defect inherent in the vehicles' design was amenable to common proof and therefore sufficient to warrant certification. They further argue that the trial court erred by decertifying the class on the secret warranty claim without a showing of changed circumstances.

We conclude that the trial court abused its discretion in denying class certification based on an analysis of the merits of plaintiffs' claims. Further, while the trial court had the authority to reconsider its certification ruling on its own motion, it similarly erred in considering the merits on plaintiffs' secret warranty claim. Therefore, we reverse.

BACKGROUND

I. *Plaintiffs' claims*

Plaintiff Case purchased a new 2003 Honda Accord V6 with an automatic transmission in November 2002. She took her vehicle into a Honda dealership in response to a transmission recall issued by Honda in 2004. According to Case, the dealer "installed an oil jet kit pursuant to the recall procedures." She contended that her transmission malfunctioned on July 20, 2009, as it "would not go into reverse gear." She took her vehicle to a Honda dealership, but the dealership informed her it could not find anything wrong. On July 27, 2009, she was driving on the freeway when her vehicle "suddenly downshifted and rapidly decelerated." There were 59,142 miles on her vehicle at the time. When Case took her car to a dealership again, the dealership informed her that she needed a new transmission at a cost of $4,500. She complained to Honda and Honda agreed to replace the transmission for $1,885.66.

Plaintiff Shararian purchased a new 2003 Honda Accord in June 2003. Like Case, she took her Honda to a dealership in response to the 2004 recall and had the oil jet kit installed. She alleged that, in July 2006, when she had approximately 86,000 miles on her vehicle, her "transmission suddenly slipped in gear" while she was driving on the freeway and she was unable to accelerate. She had her vehicle towed to a Honda dealership, where she was told she needed a replacement transmission. She paid a "$400 deductible for a replacement transmission." On December 10, 2009, after she had driven approximately 86,000 miles with the replacement transmission, Shararian's vehicle "suddenly downshifted into second gear, causing a jolting deceleration." She was told by the dealership that the transmission had to be replaced again, at a cost of $4,200. She ultimately paid $2,500 for a rebuilt transmission at an independent repair shop.

Case filed suit against Honda in federal court in August 2009. She dismissed that action, then filed a virtually identical complaint in Los Angeles Superior Court in October 2009. Shararian later joined the action; together, the plaintiffs filed the operative second amended complaint (SAC) in April 2011 on behalf of a putative class against Honda. The SAC alleged claims for (1) violation of the Consumer Legal Remedies Acts (CLRA); (2) violation of the Secret Warranties Law; (3) "other violations" of the Unfair Competition Law (UCL); (4) restitution of unjust enrichment; (5) fraudulent concealment; and (6) false advertising. Plaintiffs alleged that a variety of Honda's vehicles, marketed under the Honda and Acura brand names and including the models they owned, contained a "defective and dangerous automatic transmission assembly."

The SAC further alleged the following facts: the "transmission assembly as designed has an inherent defect which causes both failure of the transmission and a safety concern." The transmission defect made the transmission "prone to transmission 'slipping'"; when such slipping occurred while the vehicle was being driven, "the transmission gears will either not engage, causing an unexpected loss of acceleration, or the transmission will unexpectedly and without warning shift into a lower gear causing a violent and sharp drop in the speed of the vehicle, and/or a loss of control." The defect required "a complete overhaul and/or replacement" of the transmission assembly, but the replacement assembly suffered from the same defect, which Honda failed to disclose to the owners at the time of repair. Further, the defect caused the transmission to become "prone to failure before or soon after the expiration of the 60,000 mile warranty period," a much shorter period than the usual life of a vehicle's transmission.

Plaintiffs alleged that Honda knew of the defect as early as 2002, as consumers lodged "numerous complaints about transmission slipping problems." Honda issued a recall related to transmission overheating and "lockup" in 2004, but the repair offered did not remedy the defect. As a result, between 2002 and 2011, Honda and the National Highway Traffic Safety Administration (NHTSA) received "hundreds, if not thousands, of complaints from Vehicle owners about premature transmission failure." Despite its purported awareness of the defect and associated safety concerns, Honda failed to disclose the defect, the "faulty 2004 recall repair," or the fact that replacement transmissions suffered from the same defect. Honda also advised

owners to replace their transmissions and "charged them for the defective replacement transmission."

Plaintiffs also alleged that Honda violated the Secret Warranty Law (Civ. Code, § 1795.90 et seq.). Specifically, Honda "implemented a policy of making warranty accommodations and adjustments for Vehicle owners who complained loudly enough," without proper notice to all consumers of any warranty extension. Under this policy, Honda offered "partial or full 'goodwill' accommodations with post-warranty transmission repair or replacement," to thousands of owners of class vehicles.

II. *Motion for class certification*

Plaintiffs moved for class certification on July 7, 2015. They sought to certify a class of the following vehicles: (1) 2003 Acura 3.2CL Type-S; (2) 2003 to 2004 Acura 3.2TL Type-S; (3) 2001to 2002 Acura MDX; (4) 2003 to 2004 Honda Accord V6; (5) 2002 to 2004 Honda Odyssey; and (6) 2003 to 2004 Honda Pilot (class vehicles). They contended that all class vehicles shared a "common, inherent design defect" in the transmission, namely, that the vehicles had five plates in the third clutch. According to plaintiffs, the third clutch required six clutch plates to allow heat to adequately dissipate. "Consequently, under normal driving conditions, the 3rd clutch is capable of experiencing excessive heat, causing the 3rd clutch to gradually wear and degrade . . . eventually leading to premature transmission failure."[1]

Plaintiffs claimed Honda knew in 2001 based on an internal investigation for earlier model year vehicles that "the

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[1] Plaintiffs identified the defect as the design of the third clutch for the first time in their motion for certification. Prior to that, they had pursued several other transmission defect theories.

premature transmission failures were due to 3rd clutch degradation/burning" resulting from a "fundamental" design defect in the 5-speed automatic transmission. Honda "tweak[ed]," rather than redesigned, the transmission system for the model years starting in 2002 (producing the class vehicles), then implemented a recall of all class vehicles in 2004 after realizing that "a defect still persisted."

During the 2004 recall, according to plaintiffs, Honda again chose to "tweak existing specifications rather than adding an additional clutch plate." As a result, the defect remained in all class vehicles. In the recall, Honda attributed the transmission issues to insufficient lubrication in the second gear. According to Honda's internal documents, for vehicles with 15,000 miles or less, Honda updated the transmission to "increase lubrication" with oil to the second gear. For vehicles over 15,000 miles, Honda inspected the transmission, and if gear discoloration existed, replaced the transmission.

Plaintiffs contended that class vehicles continued to experience premature transmission failure after the recall. For example, after receiving recall repairs on their vehicles, Case and Shararian each experienced "a premature transmission failure due to the 3rd clutch degradation defect well before 150,000 miles." In addition, Honda continued to receive a disproportionate number of transmission-related complaints following the recall. Plaintiffs contend that Honda ultimately added a sixth plate to the third clutch in later model years, which fixed the defect. Asserting that Honda failed to disclose the defect, plaintiffs sought to certify a class of "All natural persons who reside in California and own a Class Vehicle with a five-speed automatic transmission," i.e., the owners of 381,040

vehicles. Plaintiffs also contended that Honda implemented a "'secret warranty' policy, whereby it offered full or partial goodwill to certain customers who complained of the 3rd clutch defect," without disclosing the policy to consumers.

As evidence of the design defect, plaintiffs offered the following "common evidence": (1) expert testimony; (2) Honda's design and testing documents; (3) evidence of Honda's 2001 investigation; (4) the number of transmission complaints to Honda and NHTSA, compared to other Honda vehicles and peer vehicles; and (5) the decrease in transmission failures after Honda added a clutch plate to later model vehicles. Given the focus on the alleged design defect and Honda's failure to disclose it, plaintiffs argued that individual issues such as driving habits and manifestation of the defect were irrelevant.

In support of certification, plaintiffs offered the declaration of their expert, Suresh C. Bansal, Ph.D., P.E. who opined that the five plate design in the third clutch was inherently defective. They also offered the declaration of their damages expert, Steven Proto, who testified to a diminished value assessment for class vehicles based on the defect.

Honda opposed the motion for class certification, arguing, among other things, that plaintiffs presented no evidence of a common defect and their claims were not typical of the putative class. In support of its opposition, Honda offered declarations from Honda employee Thomas Shepard and its own expert, Jason Arst. Shepard noted "many material differences" among the class vehicles, including with respect to the transmission and the third clutch. He also stated that the service manual for the 2008-2010 Honda Accord, relied upon by Dr. Bansal to show that Honda added a sixth clutch plate, was the manual for the 4-cylinder

model, "which is not a Class Vehicle as defined by Plaintiffs, and which has an entirely different engine and transmission than the Accord V6."

Arst opined that plaintiffs' defect theory was "demonstrably wrong" and noted that subsequent model year vehicles retained five clutch plates in the third clutch, rather than adding a sixth plate as plaintiffs claimed. Arst also testified in deposition that he did not find any third clutch design defect in any of the class vehicles.

Honda also filed a motion to strike the testimony of both of plaintiffs' experts, and objected to plaintiffs' evidence.

The court held a lengthy hearing on the class certification motion on November 9, 2015. At the outset, the court indicated it was tentatively inclined to deny certification, stating that "the defendants have identified a major hole in the theory that [plaintiffs] are proposing, which is the notion that the later vehicles in the class had an extra part and the evidence does not seem to support that." The court further recognized that it was "looking for common evidence, but if there's no evidence, I can certainly find there's no evidence let alone common evidence of a particular point in fact." The court also related "serious concerns about whether Dr. Bansal is qualified to say what he says," noting that Dr. Bansal was speculating and lacked "firsthand knowledge about the Honda's transmission for the relevant vehicles."

Plaintiffs' counsel argued that there was "common proof of a defect," but it was "not plaintiff's duty at the class certification stage to prove the defect. It's merely . . . that proving the defect . . . will be commonly determined amongst the class." He argued that Dr. Bansal's testimony and Honda's 2001 investigation into

the vehicle's inability to dissipate heat in the third clutch established the defect, and the failure rates among the vehicles established its commonality.

The court agreed that Honda's investigation and findings would be common evidence, but these findings related to non-class vehicles. During argument, Honda focused heavily on the purported issues with Dr. Bansal's testimony and the other evidence put forth by plaintiffs. The court suggested Honda's presentation was "tantamount to asking me to grant summary judgment," and noted that "class certification is always just a procedural mechanism, it shouldn't be summary judgment." Honda's counsel responded that Honda was "not asking for summary judgment," but was "focusing on the lack of substantial evidence that the plaintiffs need to put in front of your honor regarding commonality of defect. . . . And the plaintiffs have failed to provide you with any evidence let alone substantial evidence of commonality."

III. *Order on class certification*

The court partially granted plaintiffs' motion on December 4, 2015, certifying a class for plaintiffs' cause of action alleging Honda violated the Secret Warranty Law. The court found that the claim "can be proved or disproved based on Honda's internal records," and therefore that "this common proof renders the claim amenable to class treatment."

The court denied plaintiffs' motion as to their claims that Honda failed to disclose the purported transmission defect in the class vehicles and therefore violated the CLRA, UCL, and FAL, and furthermore engaged in fraudulent concealment. First, the court found that in order for plaintiffs to obtain class certification on any of these claims, they "must first present common proof

regarding the existence of a defect." However, the court concluded that plaintiffs "failed to provide any evidence demonstrating whether or not there is a defect, let alone common evidence in that regard."

The court preliminarily examined whether plaintiffs had presented "admissible evidence establishing whether or not there was a defect" and concluded they had failed to do so. For this analysis, the court identified shortcomings in plaintiffs' proffered evidence showing a defect. Plaintiffs relied on five categories of evidence: (1) expert testimony by Dr. Bansal; (2) design information from specification documents and service manuals for the class vehicles; (3) documents from Honda's 2001 investigation into issues with the third clutch; (4) charts showing the number of powertrain-related complaints; and (5) evidence related to the decrease in transmission failures in later model vehicles, which plaintiffs contended occurred because Honda added a clutch plate. The court found all of this evidence was "either inadmissible or not probative of the specific defect Plaintiffs allege."

Specifically, the court granted Honda's motion to strike Dr. Bansal's report and testimony, finding that "Dr. Bansal is not adequately qualified and relies on inadmissible evidence and/or data that fails to support his conclusions." In particular, the court noted that Dr. Bansal testified at his deposition that he did not know whether the results of the 2001 investigation had "any relation" to later model year vehicles.

With respect to the documents from Honda's 2001 investigation, the court found that plaintiffs had not provided testimony from anyone qualified to interpret "those highly technical documents," and, as a result, "the Court cannot

determine whether the documents . . . actually support Plaintiffs' position." In addition, plaintiffs admitted that the 2001 investigation documents pertained to defects in a vehicle outside of the class (the 2001-2002 Acura 3.2CL) and "fail[ed] to explain or provide evidence" of how these documents were probative of defects in class vehicles.

The court also sustained Honda's objections to the charts of owner complaints presented by plaintiffs, concluding that plaintiffs' counsel failed to establish his own "qualifications for reviewing and compiling complaints made to the NHTSA or determining what qualifies as a 'peer vehicle;'" that plaintiffs failed to show whether the charts excluded complaints related to the 2004 recall; and that the charts did not show how many of the complaints were transmission related, or more specifically, related to the specific defect alleged.

In their motion, plaintiffs argued that complaints declined for model vehicle years 2008 to 2010 after Honda installed a sixth clutch plate in the third clutch, which constituted evidence of a defect in the class vehicles. The court concluded that plaintiffs failed to present any "records or other common proof" demonstrating that Honda had installed an additional clutch plate starting in 2008. Plaintiffs' only evidence in support of this contention was a service manual for a 4-cylinder Honda Accord, not a class vehicle. By contrast, Honda presented evidence that several class vehicles, including the Honda Accord V6, maintained five clutch plates in the third gear through 2012. The court thus concluded that plaintiffs had failed to present "any admissible proof . . . of the alleged defect in Class Vehicles' transmission."

Next, the court examined whether, even if plaintiffs' evidence of a defect "were admissible," the question of a design defect was susceptible to common proof. The court again concluded plaintiffs had not met their burden. Here, the court relied on testimony by Honda's expert, Shepard, that the class vehicles included "a diverse cross section of Honda and Acura's 13 vehicle line-up, including two SUV's, a mini-van, luxury sports cars, and standard passenger vehicles." Shepard stated that these vehicles contained "material" differences in their transmissions. Both Shepard and Bansal agreed that the third clutch discs and plates in the class vehicles had different dimensions and thicknesses. As such, the court found that plaintiffs lacked common evidence probative of a defect across models and model years. The court further noted evidence presented by Honda that "numerous factors affect transmission durability," including operator and environmental factors. The court reasoned that because plaintiffs would need to "prove the existence of a defect," and sought to rely on transmission-related complaints as evidence of that defect, Honda "would be entitled to offer evidence that each one of those thousands of complaints was due to" a factor unrelated to the alleged defect. Accordingly, the court found that "the question of whether an alleged defect exists is predominated by individual issues and not susceptible to common proof."

In addition, the court concluded plaintiffs failed to provide evidence that the named plaintiffs' claims were typical of the class. Notably, Dr. Bansal admitted he never inspected either of the named plaintiffs' vehicles or transmissions and could not provide an opinion as to why either transmission failed.

Finally, the court found plaintiffs failed to demonstrate that trial on a class basis would be manageable. The trial plan submitted by plaintiffs "does not tell the Court who the Plaintiffs intend to call as witnesses, what the witnesses will testify about, and whether their testimony will present evidence common to the class or how long it will take." Plaintiffs also failed to satisfactorily explain how damages would be calculated on a class-wide basis.

IV. *Reconsideration of certification of secret warranty claim*

At a status conference on December 15, 2015, Honda's counsel stated that "there is some confusion" about the portion of the court's order granting certification on the secret warranty claim. He then argued that "the secret warranty claim is necessarily tethered to a particular defect" and would not be subject to common proof, given the court's findings as to lack of evidence of a common defect. The court stated it would "allow a reconsideration on this issue because, I'll be honest, we spent so much time and effort on the first part of that motion . . . that I think we ran out of steam perhaps by the time we reached the second issue, which I viewed as subordinate." The court further noted that "if I made a mistake I'd rather figure it out and correct it now than have the parties spend a lot of money or not. And so let's concentrate on that issue and let me revisit it." The court then stated, "the court on its own motion wishes to reconsider the question whether class certification is appropriate for the secret warranty claim, given the court's ruling as to defect, and the court invites briefing on that."

After full briefing by the parties, the court held a hearing on October 28, 2016. Plaintiffs argued that Honda was

improperly attempting to rely on new evidence and new arguments in seeking reconsideration. They further asserted that there was no requirement that a secret warranty claim be tethered to a particular defect, and the purported secret warranty program applied to all transmission complaints. Honda argued that plaintiffs tethered their secret warranty claim to the alleged defect in their complaint and their motion for class certification.

The court issued a tentative written ruling, which it adopted as its final order. First, the court found it had authority to reconsider its prior certification order on its own motion pursuant to *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*). Next, the court turned to plaintiffs' argument that violation of the secret warranty law did not require an underlying defect, as the statute included extended warranty programs to repair "any condition." (Civ. Code § 1795.90.) The court noted that plaintiffs' SAC alleged Honda had developed the secret warranty program in response to complaints about the "Defect," i.e., "slipping" of the transmission due to a defect in the transmission assembly. The court concluded that "[r]egardless [*sic*] whether Plaintiff must establish an 'underlying defect' or merely 'any condition,' to maintain a class action, Plaintiffs must establish that there was a common defect or condition that is subject to common proof and gave rise to a secret warranty." Plaintiffs had pointed to evidence that Honda offered 4,369 post-warranty repairs or replacements for certain Honda and Acura vehicles and notified consumers about a warranty extension only as to certain 2003 Acura CL and TL vehicles. However, the court rejected plaintiffs' argument that the number of repairs or replacements alone was sufficient to suggest that Honda had used a secret warranty program, rather than an "ad hoc" policy of

warranty extension on a case-by-case basis as it claimed. Honda's written policy reflected a case-by-case determination. Further, the transmission-related claims "did not all culminate in repairs or in common types of repairs," including Honda's denial of requests for 1,920 customers. Thus, without "evidence of a common underlying defect or condition, the Court has no reason to believe there will be common evidence of Defendants' reasons for the 4,369 repairs." The court therefore concluded that plaintiffs failed to "offer substantial evidence showing that its secret warranty claim is susceptible to common proof" and "decline[d] to certify" a class on the secret warranty claim.

Plaintiffs timely appealed the court's initial denial of certification of its failure to disclose claims, as well as the court's reconsideration and denial of certification on the secret warranty law.

DISCUSSION

Plaintiffs contend the trial court erred by requiring them to prove the existence of the third clutch design defect and then denying class certification based on its improper inquiry into the merits of their claims. They further argue that the court lacked the authority to reconsider and ultimately reverse its certification of a class on their secret warranty claim. We agree with plaintiffs that the trial court abused its discretion in evaluating the merits of plaintiffs' claims at the class certification stage. Further, while we conclude that the trial court acted within its authority to reconsider certification of the secret warranty claim, its decision to decertify the class was based on the merits of the claim and therefore in error.

I. *Standard of review*

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

The central issue in this case is the presence or absence of predominant common questions. "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'

[Citations.]" (*Brinker, supra*, 53 Cal.4th at pp. 1021–1022, fn. omitted.)

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) We review an order denying certification for abuse of that discretion. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530 (*Ayala*).) A trial court ruling supported by substantial evidence generally will not be disturbed unless improper criteria were used or erroneous legal assumptions were made. (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 (*Sav-on*).) "An appeal from an order denying class certification presents an exception to customary appellate practice by which we review only the trial court's ruling, not its rationale. If the trial court failed to conduct the correct legal analysis in deciding not to certify a class action, "'an appellate court is required to reverse an order denying class certification . . ., 'even though there may be substantial evidence to support the court's order.'" [Citation.] In short, we "'consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial." [Citation.]' [Citations.]" (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 399 (*Alberts*).)

II. *Denial of certification for failure to disclose claims*

A. *Predominant common questions*

Plaintiffs' central contention is that the trial court "fundamentally misapplied the predominance criteria" by requiring plaintiffs to prove the existence of the third clutch design defect as a prerequisite to certification. As such, plaintiffs

argue that the trial court improperly delved into the merits of their claim by weighing their evidence against the evidence submitted by Honda. We agree.

Plaintiffs assert that their theory of liability turns on a common question—whether the class vehicles all contained a design defect—that would generate a common answer for the entire class. They argue that they were not additionally required to present admissible evidence sufficient to prove the existence of the design defect in order to certify the class.

The Supreme Court has repeatedly held that the inquiry on a motion for class certification "is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Sav–On, supra*, 34 Cal.4th at p. 326, quoting *Linder, supra*, 23 Cal.4th at pp. 439-440; see also *Brinker, supra*, 53 Cal.4th at p. 1023 ["resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided, with the court assuming for purposes of the certification motion that any claims have merit"].) In other words, "[a]s the focus in a certification dispute is on what *type of questions*—common or individual—are likely to arise in the action, rather than on the merits of the case [citations], in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.' [Citations.]" (*Sav-on, supra*, 34 Cal.4th at p. 327 (emphasis added).)

For example, in *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 281, the plaintiff alleged Rite Aid had a uniform policy requiring its employees operating cash registers to stand in violation of California law. The Court of Appeal determined the trial court erred in basing its decertification order on an assessment of the merits of the claim rather than on whether the theory of liability was amenable to class treatment. Relying on *Brinker* and its progeny, the court found that plaintiff's theory of recovery—that the challenged uniform policy violated labor laws—mandated class certification because it was "amenable to common proof." (*Id.* at pp. 292-293.) The trial court had not found the converse—that the central questions under plaintiff's theory would not be amenable to common proof—but instead improperly determined that plaintiff's "theory of liability was unmeritorious." (*Id.* at p. 292.) Thus, the Court of Appeal reversed, concluding that, "at the class certification stage, as long as the plaintiff's posited theory of liability is *amenable* to resolution on a classwide basis, the court should certify the action for class treatment *even if* the plaintiff's theory is ultimately incorrect at its substantive level, because such an approach relieves the defendant of the jeopardy of serial class actions and, once the defendant demonstrates the posited theory is substantively flawed, the defendant 'obtain[s] the preclusive benefits of such victories against an entire class and not just a named plaintiff.'" (*Id.* at pp. 293-294, quoting *Brinker, supra*, 53 Cal.4th at pp. 1033, 1034.)

Plaintiffs' theory here is that Honda failed to warn of a design defect present in all class vehicles—the absence of a sixth plate in the third clutch to properly dissipate heat—and that all class members were injured upon purchase of these vehicles due

to their reduction in value. The trial court addressed, and the parties raise on appeal, only a single factual question central to plaintiffs' theory of recovery—whether the alleged design defect existed.[2] "[A]ssuming for the purposes of the certification . . . that [plaintiffs'] claims have merit" (*Brinker, supra*, 53 Cal.4th at p. 1023), whether a design defect existed in the class vehicles is subject to common proof. Plaintiffs alleged, and Honda's expert agreed, that *all* of the class vehicles contained five clutch plates in the third clutch. The experts disagreed as to whether the design of five clutch plates represented a defect that could lead to transmission failure. However, they each reached a single conclusion as to all class vehicles—plaintiffs' expert opined that the defect was present in all class vehicles, Honda's expert concluded that it was present in none of them. Thus, whether that design was defective, as plaintiffs assert, will be proven or disproven as to all class vehicles.

Rather than analyzing the issue of whether the defect alleged by plaintiffs was amenable to common proof, the court focused on whether plaintiffs had sufficiently proved the existence of the inherent design defect. In doing so, the court improperly evaluated the merits of plaintiffs' claims. (See *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986, 997 ["Plaintiffs' theory of recovery based on the existence of a uniform policy . . . presents predominantly common issues of fact and law. . . . Moreover, the trial court erred to the extent that its ruling was based on its evaluation of the merits of Plaintiffs' claim as to the existence of such a uniform policy."]; *Williams v. Superior*

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[2] As such, we do not address other issues relevant to plaintiffs' claims, such as the extent of Honda's knowledge of the defect and its failure to disclose it.

Court (2013) 221 Cal.App.4th 1353, 1370 (*Williams*) [declining to address defendant's evidence challenging the plaintiff's claim of a companywide practice, "because doing so goes to the merits of the class claims"]; *Alberts, supra*, 241 Cal.App.4th at p. 407 ["Nor was the court correct to require, at the certification stage, that plaintiffs demonstrate a 'universal practice' on the part of management. . . . The trial court failed to analyze the proper question—whether plaintiffs had articulated a theory susceptible to common resolution."].)

In essence, the trial court fashioned a two-step test for plaintiffs to establish predominance: first, plaintiffs were required to "present admissible evidence establishing whether or not there was a defect"; second, plaintiffs had to demonstrate how that evidence was "common evidence." The first requirement is unsupported by the authorities discussed herein and was an improper standard to impose at the class certification stage. Thus, the court abused its discretion in requiring plaintiffs to present admissible evidence that the design was in fact defective, rather than focusing on whether plaintiffs had established that the class vehicles shared the allegedly defective design—a common issue.

In so doing, the court improperly evaluated the admissibility of plaintiffs' evidence and weighed it against the evidence offered by Honda. For example, the court noted the documents from Honda's 2001 investigation, which plaintiffs argued showed degradation and burning of the third clutch related to increased temperatures of the clutch plate in model years immediately preceding class vehicles. Despite noting that this evidence appeared to be "some common proof inside of Honda that its documentation and studies inside concluded there was

excessive burning," the court evaluated the sufficiency of this evidence against Honda's "counter proof."[3] The court ultimately rejected plaintiffs' evidence as inadmissible and not probative, finding that plaintiffs had not adequately proved that the 2001 documents showed a defect in the class vehicles. But the trial court's requirement that plaintiffs conclusively prove the existence of the defect obscured the relevant issue. For example, while the 2001 investigation documents, alone, would not *prove* the defect existed in the vehicles from the following model year, they certainly could be relevant to support plaintiffs' theory that Honda failed to correct the defect in the transmission design of the class vehicles.

The trial court's analysis as to whether plaintiffs had proved their defect theory improperly focused on the merits of plaintiffs' claim and weighed the probative value of plaintiffs' evidence against evidence supplied by Honda. Indeed, the court repeatedly expressed concern during the hearing that Honda's opposition was "tantamount to asking me to grant summary

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[3] Honda argues that we should not rely on the trial court's statements during the hearing, as "we may not use the court's oral statements to impeach its written order." (See *Williams, supra*, 221 Cal.App.4th at p. 1361, citing *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300–301.) Here, we look to the court's analysis offered during the class certification hearing only to the extent it is consistent with the reasoning set forth in the court's final written order and sheds further light on the propriety of that reasoning. (See *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [concluding trial court used improper criteria in denying class certification based on the court's "written order (as well as statements made at the motion hearing)"].)

judgment." As the Supreme Court has explained, "When the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading (demurrer) or motion (judgment on the pleadings, summary judgment, or summary adjudication) that affords proper notice and employs clear standards. Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. Substantial discovery also may be required if plaintiffs are expected to make meaningful presentations on the merits. All of that is likely to render the certification process more protracted and cumbersome. . . . Such complications hardly seem necessary when procedures already exist for early merit challenges." (*Linder, supra*, 23 Cal.4th at pp. 440–441.)

Although it may not have been presented in admissible form at the certification stage, plaintiffs pointed to the type of classwide evidence that could, if meritorious, establish liability—including expert testimony regarding the transmission design, internal Honda documents relating to its 2001 investigation and 2004 recall, and complaints showing increased frequency of problems during the class period. (See *Anthony v. General Motors Corp*. (1973) 33 Cal.App.3d 699, 707 (*Anthony*) ["It is not material that those facts may not appear in the record in a form, or with the foundation, which would make such findings and statements as now presented, admissible in evidence at a trial. It is enough that it appears that evidence in support of plaintiffs' theory may be available when the case goes to trial."]; see also *In*

re Cipro Cases I and II (2004) 121 Cal.App.4th 402, 412–413 ["At the class certification stage, the court must . . . consider merely whether the evidence the plaintiffs will offer . . . will be sufficiently generalized in nature."].) Plaintiffs' theory of a defect inherent in the design of the class vehicles, therefore, is amenable to class treatment. (See, e.g., *Ayala, supra,* 59 Cal.4th at p. 537 [trial court erred in denying certification by "'focus[ing] too much on the substantive issue . . . instead of whether that question could be decided using common proof'"]; *Anthony, supra,* 33 Cal.App.3d at pp. 704-705 ["[T]he gravamen of plaintiffs' case is the contention that all wheels of the type involved contain an inherent defect which may cause them to fail. . . . It is exactly the sort of common issue for which class actions are designed."]; *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* (6th Cir. 2013) 722 F.3d 838, 857 ["If Whirlpool can prove that most class members have not experienced a mold problem and that it adequately warned consumers . . ., then Whirlpool should welcome class certification. By proving that the Duets are not defectively designed and that no warnings were needed (or if they were, that adequate warnings were issued to consumers), Whirlpool can obtain a judgment binding all class members who do not opt out of the class."].)

Nor was this a case in which examination of the merits was necessary as a predicate to determining the issue of predominance. Such inquiries must be "closely circumscribed" (*Brinker, supra*, 53 Cal.4th at p. 1024), and limited to instances when "certification 'depends upon' the disputed issue" (*Ayala, supra*, 59 Cal.4th at p. 537). One example, as discussed in *Brinker*, was *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906. (See *Brinker, supra*, 53 Cal.4th at p. 1025.)

There, because members of the putative nationwide class were subject to choice-of-law agreements, it was necessary at the certification stage for the trial court to determine "whether the agreements were enforceable and would result in the application of different state laws, and whether any applicable state laws varied in ways that would render the class proceeding unmanageable." (*Brinker, supra*, 53 Cal.4th at p. 1025, citing *Washington Mutual*, supra, 24 Cal.4th at pp. 915, 922, 927–928.) Here, by contrast, we find no indication that resolution of the existence of the alleged design defect was necessary to the trial court's assessment of whether the defect theory was subject to common questions of law and fact.

The trial court also abused its discretion in the second step of its inquiry on commonality. The court held that even if plaintiffs' evidence were admissible, Honda presented "evidence showing that the question of whether a defect existed in the Class Vehicles is not susceptible to common proof." First, the court cited testimony from Honda's expert regarding certain differences in the transmissions of the class vehicles and concluded that evidence of a defect was not "necessarily probative" across all class vehicles. But none of the transmission differences cited by the court appear to be directly related to the specific design defect alleged by plaintiffs.

Second, the court relied on evidence presented by Honda that "numerous factors affect transmission durability." Citing *American Honda Motor Co. v Superior Court (Lee)* (2011) 199 Cal. App. 4th 1367, the court found that plaintiffs would have to prove the existence of the defect at trial, which would present individual issues of whether any clutch problems were caused by the design defect or by other factors. The reliance on *Lee* by the

trial court and by Honda is misplaced. The plaintiff in *Lee* alleged a breach of warranty; that claim required the plaintiff to "provide substantial evidence of a defect that is substantially certain to result in malfunction during the useful life of the product." (*Id*. at p. 1375.) Accordingly, the *Lee* court assessed the individual issues arising from plaintiffs' allegations that the defect *caused* the vehicle malfunctions, rather than the existence of the design defect alone. (*Id*. at p. 1377-1378.) Here, plaintiffs have alleged claims for failure to disclose a design defect; none of the transmission durability factors cited by the trial court relate to plaintiffs' ability to establish the existence of that defect.[4]

As such, under the circumstances presented here, we conclude that the trial court erroneously denied class certification based on an assessment of the merits of plaintiffs' claim rather than the commonality of their theory of liability.

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[4] The trial court also erred in finding that individual issues predominated based on Honda's ability to offer evidence of individual complaints stemming from issues unrelated to the alleged transmission defect. Any failure of proof related to liability would extend to the entire class, rather than requiring "thousands of mini-trials" as the court suggests. And to the extent Honda's evidence of individual transmission failures goes to the issue of individual damages, it is irrelevant to the determination of predominance. (See *Jones, supra*, 221 Cal.App.4th at p. 997 ["the trial court applied improper criteria by focusing on individual issues concerning the right to recover damages rather than evaluating whether the theory of recovery is amenable to class treatment"]; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299 ["The trial court misapplied the criteria, focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment.'"].)

B. *Typicality*

We also conclude the trial court erred in finding the named plaintiffs failed to establish that their claims are typical of the class. In its analysis, the court focused on the lack of evidence establishing that Case and Shararian's transmissions failed because of the alleged defect.

"Certification requires a showing that the class representative has claims or defenses typical of the class. [Citation.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1090.) "The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's 'interests are antagonistic to or in conflict with the objectives of those [s]he purports to represent' that denial of class certification is appropriate." (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99, citing *Fireside Bank v. Superior Court, supra,* 40 Cal.4th at pp. 1090-1091.)

Case and Shararian assert that their claims are identical to those of the putative class, as they each owned a class vehicle containing the alleged design defect and were injured by the loss in value resulting from that undisclosed defect. Under plaintiffs' theory, the class vehicles, as designed, were defective. Thus, every vehicle within the class would contain the same alleged defect and there are no individualized issues that would raise a typicality problem. Honda's liability to the class turns on plaintiffs' claims that a safety-related design defect existed, that Honda knew about it, and that it failed to disclose this knowledge

to buyers. Whether plaintiffs' transmission failures were ultimately caused by this defect is immaterial.

C. *Manageability*

The trial court also denied class certification based on a determination that plaintiffs failed to "demonstrate that trial on a class basis would be manageable." This was error.

The assessment of manageability of a class action requires a determination whether "litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. [Citation.] '[W]hether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues. [Citation.]'" (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 28-29; see also *Sav–On, supra*, 34 Cal.4th at p. 334 ["Individual issues do not render class certification inappropriate so long as such issues may effectively be managed."].)

Here, citing *Duran*, the trial court considered the burdens likely imposed by a class action trial, including the number of witnesses presenting evidence to "prove liability," the length of the trial, and the effect a large class trial might have on the court's overcrowded docket. While valid, none of these considerations demonstrate that a single classwide proceeding would be less "'advantageous to the judicial process and to litigants'" than adjudicating the same issues over a series of separate individual actions. (*Ayala, supra*, 59 Cal.4th at p. 539, citing *Brinker, supra*, 53 Cal.4th at p. 1021.) The trial court failed to identify or assess any individual issues that might render the proposed class action unmanageable. As such, the court lacked substantial evidence to conclude that plaintiffs had failed to meet their burden on this issue.

Accordingly, we reverse the trial court's denial of certification on plaintiffs' failure to disclose claims.

III. *Decertification of secret warranty claim*

Plaintiffs challenge the trial court's decision to decertify the secret warranty class in two ways. First, they contend that a class may only be decertified upon a finding of changed circumstances, and no such finding was made here. Second, they again argue that the trial court improperly evaluated the merits of their claim. We examine each in turn.

Rule 3.764(a)(4) of the California Rules of Court provides that any party may file a motion to decertify a class. "Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate." (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1226, citing *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360; see also *Sav-On, supra*, 34 Cal.4th at p. 335 ["if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification"].) In *Green v. Obledo* (1981) 29 Cal.3d 126, our Supreme Court held that "a class should be decertified 'only where it is clear there exist changed circumstances making continued class action treatment improper.' [Citation.]" (*Id.* at p. 148.) "This standard will prevent abuse on the part of the defendant while providing the trial court with enough flexibility to justly manage the class action." (*Id.* at p. 148 & fn. 17.)

Plaintiffs contend that there were no changed circumstances to warrant the court's consideration of a motion to

decertify. We agree. However, the trial court did not purport to act pursuant to that standard. Instead, it exercised its inherent "ability to reconsider its previous interim orders on its own motion, as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question." (*Le Francois, supra*, 35 Cal.4th at p. 1097.)

We find *Le Francois* instructive here, as the court discussed the interplay between statutory directives and the court's inherent authority to reconsider its own orders. In that case, the trial court denied defendants' motion for summary judgment. Over a year later, individual defendants filed a new motion for summary judgment based on the same grounds. The motion was transferred to another judge who granted it. (*Le Francois, supra*, 35 Cal.4th at p. 1097.) Our Supreme Court held the trial court erred in granting the second motion. (*Id*. at p. 1109.)

The court examined Code of Civil Procedure section 437c, subdivision (f)(2), which prohibits a party from bringing a second summary judgment motion on the same grounds without a showing of newly discovered facts or circumstances or a change of law, and section 1008, which more generally requires that any motion for reconsideration be based upon "new or different facts, circumstances, or law." The court concluded that the restrictions in both statutes applied to motions filed by the *parties*. (*Id*. at p. 1104.) However, neither statute limited the court's ability to reconsider its own prior orders on its own motion. (*Id*. at p. 1107.) motion. Thus, "[u]nless the requirements of section 437c, subdivision (f)(2), or 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court *on its own motion*. To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been

erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing." (*Id.* at p. 1108 (emphasis in original).) The court also noted that "it should not matter whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion. If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief. For example, nothing would prevent the losing party from asking the court at a status conference to reconsider a ruling. [Citation.] But a party may not file a written *motion* to reconsider that has procedural significance if it does not satisfy the requirements of section 437c, subdivision (f)(2), or 1008." (*Ibid.*)

Similarly, here, Honda's counsel suggested during a status conference that the court might revisit its ruling on the secret warranty claim, given the court's reasoning for denying certification as to the other claims. The court agreed, noting that neither the parties nor the court had focused heavily on that claim during the initial certification briefing and argument. The court then invited briefing and argument on the issue. We find no error in the court's application of this procedure.

None of plaintiffs' cited cases support their contention that *Le Francois* cannot extend to a court's ability to reconsider a certification order sua sponte. (See *Even Zohar Const. & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 841 [analyzing applications for relief from default under Code Civ. Proc. § 473(b)]; *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1303-1304 [affirming a trial court's authority

to grant reconsideration of a prior order based on a motion filed in violation of Code of Civil Procedure section 1008]; *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463 [same].) These cases do not preclude the trial court's exercise of its authority here.

However, we find the trial court did abuse its discretion in its substantive determination to decertify the secret warranty class. (See *Brinker, supra*, 53 Cal.4th at p. 1022; *Sav–On, supra*, 34 Cal.4th at p. 326.) As discussed above, we conclude that the trial court engaged in an improper merits analysis regarding proof of the third clutch defect. The court's subsequent decertification of the secret warranty class was based on the same analysis and a finding that the secret warranty claim was "tethered" to the purported third clutch defect. As such, the court's conclusion that plaintiffs could not establish predominance of common issues as to their secret warranty claim must be reversed as well.

DISPOSITION

We reverse the orders denying class certification of plaintiffs' failure to disclose claims and granting decertification of plaintiffs' secret warranty claim. We remand the matter for further proceedings consistent with this opinion. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. MANELLA, J.