No. S274625

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

EVERARDO RODRIGUEZ and JUDITH V. ARELLANO,

Plaintiffs and Appellants,

v.

FCA US, LLC,

Defendant and Respondent.

California Court of Appeal, Fourth District, Division Two, Civil No. E073766
Appeal from Riverside County Superior Court
Case No. RIC1807727
Honorable Jackson Lucky, Judge Presiding

EXHIBITS IN SUPPORT OF PETITIONERS' MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF

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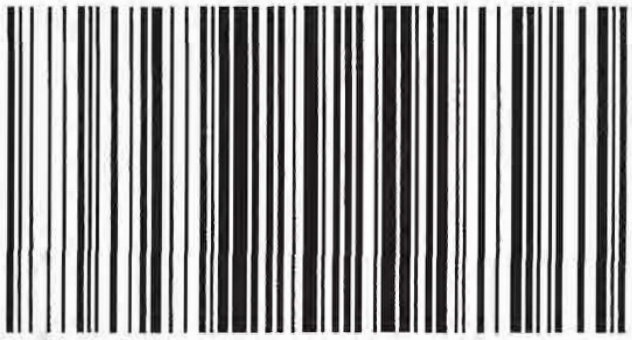

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Docket #C018430

Brief Type: Appellant's Opening

Box #: 3771

Entered 11/6/2014 1:21:06 PM by rquinesares

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IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

LISA A. JENSEN

Plaintiff, Respondent and Cross-Appellant

vs.

BMW OF NORTH AMERICA INC.

Defendant, Appellant and Cross-Respondent

Appeal from the Judgment of the Superior Court
of California, County of Placer
Honorable J. Richard Couzens, Judge

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3 Civil C018430

IN THE COURT OF APPEAL

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TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
1.	Letter of October 7, 1994 to Placer County Superior Court Appeals Clerk re: Request for Supplemental Clerk's Transcript on Appeal; Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict
2.	Letter of September 14, 1987 to Governor Deukmejian re: Assembly Bill 2057
3.	Enrolled Bill Report re: AB 2057
4.	Connecticut General Statutes Annotated sections 42-220 through 42,226

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INTRODUCTION

This appeal arises out of a civil suit tried before a jury in Placer County Superior Court. Plaintiff and respondent Lisa Jensen (aka Lisa Scott, hereinafter "respondent") brought suit against defendants and appellants BMW of North America, Inc., BMW Leasing Corporation, BMW Credit Corporation (collectively referred to hereinafter as "BMW") and other defendants alleging violations of the Song-Beverly Consumer Warranty Act, the Federal Magnuson-Moss Warranty Act, and the California Commercial Code. (CT 1-26.) She claimed that the used BMW she leased in 1989 was covered by an existing manufacturer's limited warranty, did not conform to that warranty and had not been appropriately repaired or replaced by BMW. The jury returned a verdict for plaintiff, awarding her damages of $29,351.00 and imposing a civil penalty of $58,702.00 against BMW. (CT 129-30.) BMW moved the lower court for a new trial and for judgment notwithstanding the verdict. (CT 370-80, 646-84.) Both motions were denied. (CT 733.)[1]

Certain key errors were committed below which mandate reversal of the judgment based on the jury's verdict. First, BMW believes that the trial court incorrectly interpreted portions of the Song-Beverly Consumer Warranty Act. Specifically, the trial judge ruled that California Civil Code section 1793.22(e), which defines "new motor vehicles" for purposes of Song-Beverly, applied to the present situation, in spite of the fact that respondent's car had been previously registered in the State of New Jersey and was not a "demonstrator." (RT 8-19, 542, 691-92, 696-97; CT 747-48.) Review of the plain language of the statute and the legislative intent of the Act makes it improbable that Song-Beverly was intended to apply to respondent's vehicle. Since respondent's case was tried only for damages under Song-Beverly, reversal on this ground mandates judgment in BMW's favor.

Second, the special verdict form presented to the jury was fatally defective in that it omitted the initial question of liability which was agreed to by counsel and the court.

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[1] The order denying defendants' motion for Judgment Notwithstanding the Verdict has not been submitted by the Superior Court. A copy of Appellants' letter to the clerk of the court and the signed order are attached hereto as Exhibit 1.

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(CT 129-30.) The form given to the jury failed to ask if BMW was liable under Song-Beverly. Instead, it merely asked what damages, if any, BMW was responsible for paying. BMW's motion for judgment notwithstanding the verdict was thereafter rejected, in spite of the fact that the defective special verdict form prejudiced the jury's deliberations.

Third, prejudicial error occurred during trial in that the jury was improperly instructed as to the applicable law. The court inadvertently failed to read a decisive portion of an instruction dealing with the factors necessary to find that BMW wilfully violated Song-Beverly. (RT 671-72.) Thereafter, the jury determined that BMW had wilfully violated Song-Beverly and imposed a civil penalty of $58,702.00. Since the jury heard an improper jury instruction on the topic of wilfulness, BMW was prejudiced by the court's omission.

Additionally, the court rejected two proposed jury instructions which were critical to BMW's case. Specifically, the court rejected BMW's proposed instruction regarding the warranty rights of lessees of used vehicles leased by a dealer with the balance of a manufacturer's new car warranty. (CT 240-41.) It also rejected BMW's proposed instruction regarding the burden of proof for a cause of action of an express warranty for a new motor vehicle, instead presenting the jury with an instruction which was deficient, misleading, ambiguous, overgeneralized, and incomplete. (RT 667-68; CT 245-46.) Therefore, the jury did not have adequate instruction to aid it in the application of the complicated issues before it. BMW was clearly prejudiced by the fact that the jury was inadequately instructed as to the applicable law in the case, and reversal is thus appropriate.

Fourth, no substantial evidence supported the jury's determination that BMW failed to repair the vehicle so as to violate Song-Beverly. The jury's verdict simply is not supported by the trial evidence. BMW's efforts to repair the car were reasonable, and that fact was acknowledged by respondent's expert. (RT 248.)

Fifth, the imposition of a civil penalty was improper for two reasons. The civil penalty was time-barred by the one-year statute of limitations since respondent waited at least eighteen months after she had notice of a potential violation of Song-Beverly before she brought the underlying suit. (RT 62-64.) Thus, BMW was clearly prejudiced by the imposition

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of a civil penalty of $58,702.00. Moreover, respondent failed to present substantial evidence to demonstrate that BMW wilfully violated the statute.

Finally, BMW was prejudiced by the repeated violation by respondent and her counsel of the court's *in limine* order banning the use of the terms "lemon law" or "lemon." Once BMW's motion *in limine* was granted, counsel was bound to abide by the order. Counsel's wilful failure to abide by the order undoubtedly influenced the trial result.

For these reasons, the judgment of the lower court based on the jury's verdict must be reversed and judgment entered instead for defendant BMW; in the alternative, the case should be retried.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. THE VEHICLE

On or about January 11, 1989, Respondent and her husband, Kelly Jensen, leased a used 1988 BMW 528e from Steven's Creek BMW/Motorsport. (RT 113.) The odometer on the vehicle read 7,565 miles at the time of lease. (RT 50.) Steven's Creek BMW/Motorsport (hereinafter "Steven's Creek BMW") obtained the subject vehicle at the Atlanta Auto Auction on December 7, 1988. (Exhibit 2.)[2] The vehicle had been previously registered in the State of New Jersey (Exhibit 6.) Appellant, BMW of North America, Inc. is the importer and distributor of the vehicle, but for purposes of Song-Beverly is considered a manufacturer. BMW will be referred to as the manufacturer throughout this brief. Since at the time of the lease, a 1988 BMW 528e was a current model year, respondent was able to take advantage of "new" car leasing terms. Respondent and her husband signed a DMV report of sale of a used vehicle, a "new car lease," and an odometer statement acknowledging that the vehicle had 7,565 miles on it at the time of lease. (Exhibits 7, 11, 15.)

[2] References to "Exhibits" are to the exhibits entered into evidence at trial.

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In July 1989, some seven months after leasing the vehicle, respondent took it to Vanderbeek Motors, Inc. (aka Roseville BMW/Suburu, hereinafter "Roseville BMW") for service as she was experiencing some vibration in the steering wheel while braking. (Exhibit 28.) The mileage on the odometer at the time of the visit was 15,317. Although respondent had taken the car to Steven's Creek BMW on two previous occasions, neither repair was for steering or brake related complaints. Steven's Creek BMW's written records indicates no steering or brake related problems either complained of nor found on those visits.

Thereafter, respondent brought her vehicle into Roseville BMW in April 1990, August 1990 and January 1991 complaining of brake problems. (Exhibits 32, 34, 42.) The vehicle was also brought to Roseville BMW in October 1990 and December 1991 for installation of parts which were ordered earlier and for an inspection by BMW personnel. (Exhibit 40.) Service technicians for BMW determined that respondent was abusive to her vehicle. Her abusive driving style was clearly causing the brake rotors to develop "hot spots."[3] (RT 405, 511, 516.) BMW replaced various brake components as a matter of good will; BMW did not feel that the problem was covered under warranty since respondent's abusive driving style was creating the problem. They were also excluded from warranty coverage since the brake and its components were "wear and tear" items. (RT 354, 413, 431.) Between July 1989 and December 1991, BMW replaced the car's rotors three times, pads two times, calipers one time and bushings one time. (RT 410, 414, 418, 421.) Respondent's abusive driving habits were the cause of the shuddering in the car. BMW made modifications to parts on the vehicle in an effort to match the driver's peculiar driving styles. (RT 353, 409, 483, 516, 528, 529-30, 531, 570, 576.) There was no defect in the vehicle or the parts.

It was apparent to representatives of BMW that respondent was not performing

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[3] "Hot Spots" are a discoloration in the surface of the rotor due to unusual heat build up. Heat build up occurs while braking and is dissipated through the surface of the rotor. If you get too much heat buildup and it cannot be dissipated, it causes discoloration which is hardening in certain spots of the rotor. (CT 405:15-26) This situation is caused by repeated brake applications, with insufficient time given to cool down the brakes, commonly known as "riding the brakes. "

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proper maintenance on her vehicle. The service panel light array indicated the need for service. (RT 475, 485.) The tires were worn and were never rotated. (RT 490.) Respondent failed to have a 30,000 mile service performed, or any scheduled service. (RT 161.) There was an oil leak which caused degradation of the engine mount. (RT 493-94, 530.) The tire pressure was low. (RT 496, 530.) The wheels were dimensionally different on one side of the car compared to the other side. (RT 497, 530.) The net effect of the pattern of abusive brake usage and the lack of maintenance on the vehicle was to create a resonant vibration in the suspension. (RT 528.) Representatives of BMW tried to tell respondent in a tactful way that she was causing her own brake problems. (RT 341, 353.) This was a delicate matter to address with a customer, and to the extent permitted by customer relations, BMW tried to make respondent aware that her abusive driving style was causing the problems she perceived.

With more than 52,000 miles on the car, respondent filed suit in Placer County Superior Court under the provisions of the Song-Beverly Act. (RT 530; CT 1-26.)

B. <u>THE LAWSUIT</u>

April 10, 1992 respondent filed a civil complaint for restitution, and damages (including a civil penalty) as against: BMW of North America, Inc.; Steven's Creek BMW, the selling dealer of her vehicle; Roseville BMW; BMW Leasing Corporation; and BMW Credit Corporation. Causes of action included violation of the Song-Beverly Consumer Warranty Act, the Federal Magnuson-Moss Warranty Act, and the California Commercial Code. (CT 1-26.) Respondent later dismissed with prejudice Steven's Creek BMW and Roseville BMW. (RT 21-22.) At trial, respondent confined her theory of the case to violations of the Song-Beverly Consumer Warranty Act. (RT 5-6.)

Jury instructions and the special verdict form were discussed in the judge's chambers on the last day of testimony. Jury instructions were read that afternoon, after which the jury was released for the day. (RT 653-677; CT 119.) The jury deliberated the next morning and returned a special verdict in favor of respondent at 11:45 am. (RT 678-683; CT 127.) The jury awarded damages and a civil penalty after finding BMW wilfully failed to meet its obligations under the Song-Beverly Act. (RT 678-683; CT 127.) Judgment was entered on

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April 5, 1994. (CT 392-395.)

BMW moved for a new trial and for judgment notwithstanding the verdict. (CT 370-381.) The motion for a new trial was based on five grounds: (1) The trial court committed prejudicial error by submitting an incomplete and fatally defective special verdict form to the jury; (2) the trial court committed reversible error of law in ruling that the Song-Beverly Consumer Warranty Act provides remedies to lessees of used motor vehicles leased subject to the balance of an unexpired manufacturer's warranty; (3) the trial court committed prejudicial error by failing to properly instruct the jury on critical theories or defenses advanced by BMW at trial; (4) the jury's verdict was unsupported by the evidence; and (5) blatant misconduct of counsel in disregarding the court's *in limine* orders required a new trial. (CT 646-79.) The motion for judgment notwithstanding the verdict was based on the ground that the Song-Beverly Consumer Warranty Act is not intended to provide remedies to lessees of used motor vehicles sold subject to the balance of an unexpired manufacturer's warranty. (CT 375-80.) The court denied both motions. (RT 700-01.)

Thereafter, BMW filed its notice of appeal on May 26, 1994. (CT 734-35.)

C. THE TRIAL

1. THE TRIAL COURT RULED THAT SONG-BEVERLY APPLIED TO RESPONDENT'S VEHICLE

Prior to the start of testimony, the trial judge ruled that respondent's used vehicle was covered by Song-Beverly's definition of "new motor vehicle." (RT 8-19, 542, 691-92, 696-97; CT 747-48.) This ruling was made in spite of the fact that the evidence supported the position that the vehicle was neither "new" nor a "demonstrator."

A certificate of title was introduced into evidence documenting that BMW Leasing Corporation held title to the vehicle in New Jersey before the vehicle was sent to Atlanta to be sold at auction. (Exhibit 6.) The certificate of title clearly establishes that the vehicle was never used as any kind of demonstrator vehicle. Had the vehicle been a demonstrator the vehicle would not have been registered or titled in the State of New Jersey or anywhere else. Further, respondent knew the vehicle was "used" as she executed DMV

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forms which indicated as much.

BMW moved the court to reconsider its Song-Beverly ruling after the second day of testimony. (RT 347-50.) Nonetheless, the judge denied the motion and upheld his earlier ruling that Song-Beverly was applicable to respondent's used vehicle. (RT 350; CT 117.)

2. THE SPECIAL VERDICT FORM

BMW's proposed special verdict form asked the jury to rule on various factual issues presented by the evidence (CT 686-95.) Respondent's proposed special verdict form began with the question, "What amount in damages, if any, should the defendants pay plaintiff?" (CT 697-98.) As a compromise, the lower court ruled in chambers and off the record that it would accept BMW's Question 16 concerning damages, rather than the formulation urged by the respondent. In addition, the court determined in chambers that the verdict form would begin with a question concerning liability to be phrased generally as follows: "Did defendant violate the Song-Beverly Warranty Act?" This question does not appear on the special verdict form ultimately submitted to the jury. (CT 129-30.)

The lower court indicated in chambers and off the record that the court clerk would be responsible for typing the final version of the verdict form. Neither counsel was thereafter given an opportunity to see the final special verdict form prior to the time it was submitted to the jury along with jury instructions. BMW's counsel only became aware of the defective nature of the form when the verdict was later read aloud in court.

Unfortunately, the sudden death of the husband of one of the court clerks during the trial understandably disrupted the otherwise smooth and efficient operation of the court. (RT 543.) The same afternoon when the jury received its instructions, all court personnel were preparing to attend the funeral. (RT 543.) Therefore, it is BMW's belief that the confusion generated by this time of loss and grieving inadvertently resulted in the preparation of the fatally defective special verdict form.

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3. THE JURY INSTRUCTIONS

Defendants submitted and the court accepted an instruction detailing for the jury the various elements necessary to show a "wilful" violation of Song-Beverly. (RT 669-72; CT 174-75.) This instruction was critical to the defendants' case in that it delineated factors for the jury to consider in determining factual issues relevant to awarding a civil penalty. The trial judge failed to read factor "i."(RT 671.) The omitted instruction states:

> i. Whether BMW of North America reasonably believed that the vehicle conformed to the applicable express warranty and that there were no unresolved problems with the vehicle.

(CT 175.) Counsel immediately brought this omission to the court's attention. (RT 671.) The trial judge expressed his erroneous belief that he had read the instruction. (RT 671.) Later, he told the jury, "Incidentally . . . I am sure I read all of the sections, but if not, it is on page 45. They are listed seriatim. You should go over them again carefully." (RT 672.)

Prejudicial error also occurred when the trial judge rejected two jury instructions. Defendants submitted an instruction concerning the warranty rights of lessees of used vehicles leased by a dealer with the balance of a manufacturer's new car warranty. (CT 240-41.) The court rejected this instruction. Another instruction was also rejected. (CT 245-46.) This one was entitled "Burden of Proof and Preponderance of Evidence - Cause of Action for Breach of Express Warranty for New Motor Vehicle." (CT 245-46.) Instead, the court adopted and read to the jury an overgeneralized and inaccurate instruction substantially identical to that proposed by plaintiff. (RT 667-668; CT 172.)

4. NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT

At trial, respondent elicited testimony from several witnesses, including herself, regarding the repairs which were made to her vehicle. This evidence, however, was not substantial enough to prove that BMW did not adequately repair the vehicle each time.[4] In fact, expert witnesses for both respondent and BMW agreed that the repairs were adequate.

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[4] Additional facts on this matter are presented in section IV. A., *infra*.

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(RT 248, 510, 524, 525, 531.)

Further, the evidence which respondent presented to prove that the cause of the shimmy she felt was a result of some defect in the vehicle failed to meet the substantiality of evidence test.[5] She presented no substantial evidence to disprove BMW's theory that respondent created a harmonic resonance vibration as a result of her abusive driving style and lack of maintenance on the car. Respondent's use of the vehicle was unreasonable.

5. THE CIVIL PENALTY

In mid-1990 respondent informed BMW she would want "to exercise other options" if her brakes "were not repaired properly" at that time. (RT 64.) In October 1990, she explained to BMW's representatives that she was frustrated with attempts to repair her vehicle. (RT 68.) She agreed to let BMW make repairs, but was clearly hesitant about the potential effectiveness of such repairs. (RT 68.) Thus, it is clear that respondent had discovered any alleged defect in the vehicle no later than October 4, 1990. She did not bring the underlying suit until April 10, 1992; at least eighteen months after respondent discovered what she believes to have been a breach by BMW of the express warranty. Therefore, respondent's award of a civil penalty is barred by the one-year limitations period. Thus, it was reversible error for the court to allow this award.

Further, the jury's finding that BMW wilfully violated Song-Beverly is not supported by substantial evidence. Plaintiff's own testimony at trial indicated that the original braking problems were solved in July 1989. (RT 60-61.) There was insufficient evidence presented by plaintiff to support her claim that BMW wilfully violated the statute.[6]

6. BMW'S IN LIMINE MOTION REGARDING USE OF THE TERMS "LEMON LAW" AND "LEMON"

BMW made a motion *in limine* to forbid respondent, respondent's attorney, and respondent's witnesses from using the terms "lemon law" and "lemon" during the trial. (CT

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[5] Additional facts on this matter are presented in section IV. B., *infra*.

[6] Additional facts on this matter are presented in section V.B., *infra*.

56-57.) This motion was granted. (CT 114.) Respondent's counsel then used the term "lemon law" on three occasions during direct and cross examination and on eleven occasions during closing arguments. (RT 305, 368, 545, 606, 607, 610, 611, 612, 619, 623, 624.) Also, respondent used the term in her testimony on direct examination. (RT 84.) These blatant violations of the judge's order resulted in prejudice in that the jury was exposed to the very information the court had determined it should not hear. BMW is entitled to a new trial on this ground.

II. STATEMENT OF APPEALABILITY

The entry of judgment by the court and its order denying BMW's motion for judgment notwithstanding the verdict are appealable under California Code of Civil Procedure section 904.1(a). (See, Cal. Code Civ. Proc. § 904.1(a)(1), (4).)

LEGAL DISCUSSION

I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT THE SONG-BEVERLY CONSUMER WARRANTY ACT, AND SPECIFICALLY THE TANNER CONSUMER PROTECTION ACT (CIVIL CODE SECTION 1793.22), PROVIDES REMEDIES TO LESSEES OF USED MOTOR VEHICLES LEASED SUBJECT TO THE BALANCE OF AN UNEXPIRED MANUFACTURER'S WARRANTY

A. SONG-BEVERLY DISTINGUISHES BETWEEN NEW AND USED GOODS

The Song-Beverly Consumer Warranty Act (hereinafter "Song-Beverly") was enacted by the California Legislature in 1970 and became effective in 1971. (See, Act of Sept. 17, 1970, ch. 1333, § 1, 1970 Cal.Stat. 2478.) The purpose of the act was to assist consumers who had purchased defective products. (See, Ralph J. Swanson, Comment, Toward an End to Consumer Frustration--Making the Song-Beverly Consumer Warranty Act Work, 14 Santa Clara Law, 575, 625 (1974).)

When Song-Beverly was originally enacted, it covered all consumer goods used or bought primarily for personal, family, or household purposes, without reference to "new"

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or "used" consumer goods. (See, Act of Sept. 17, 1970, ch. 1333, § 1, 1970 Cal.Stat. 2478.)[7] In 1971, section 1791(a) was amended to apply only to "new" consumer goods. (See, Statutes of 1971, ch. 1523, §§ 2, 17, 1971 Cal.Stat. 3001, 3008.) The 1971 amendment to section 1791(a) also added Civil Code section 1795.5, which presently provides that the obligations of distributors or retail sellers (and not motor vehicle manufacturers) selling used consumer goods in which express warranties are given are to be the same as those imposed upon manufacturers under Song-Beverly, notwithstanding the provisions of section 1791(a) defining consumer goods to mean "new" goods. (See, *Id.*; see also, Cal. Civ. Code § 1795.5.)[8]

The center-piece of Song-Beverly is the express warranty. Section 1793.2(d) obligates the manufacturer of new consumer goods sold in this state, and for which the manufacturer has made an express warranty, to service or repair the goods. If the manufacturer is unable to do so after a reasonable number of attempts, it must replace the goods or reimburse the buyer. Two separate statements of the rule are found in section 1793.2(d). Section 1793.2(d)(1) presents the general rule of replace or reimburse. Section 1793.2(d)(2) describes this rule with regard to "new motor vehicles." Neither rule imposes an obligation on the manufacturer when a used car is sold.

Civil Code section 1793.2(d)(1) describes the general rule of replace or reimburse. By itself, it might appear to apply to the sale of used goods. It reads:

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[7] Section 1791(a) originally read as follows:

> 'Consumer goods' means any motor vehicle, machine, appliance or like product that is used or bought for use primarily for personal, family, or household purposes.

(Act of Sept. 17, 1970, ch. 1333, § 1, 1970 Cal.Stat. 2478.)

[8] Civil Code section 1795, provides:

> If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer under this chapter.

(See, Cal. Civ. Code § 1795, added by Statutes of 1971, ch. 1523, §§ 2, 17, 1971 Cal.Stat. 3001, 3008.)

> Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. . . .

(Cal. Civ. Code § 1793.2(d)(1).) Section 1791, however, sets forth the definitions to be used in Song-Beverly. Therefore, the text of section 1793.2(d)(1) must be read in conjunction with the definitions of "manufacturer," "buyer,"and "consumer goods" found at the beginning of the Act. (See, Cal. Civ. Code § 1791.) Section 1791 of the Civil Code states:

> As used in this chapter:
>
> (a) "Consumer goods" means any new product or part thereof that is used, bought, or leased for use primarily for personal, family or household purposes, except for clothing and consumables. "Consumer goods" shall include new and used assistive devices sold at retail.
>
> (b) "Buyer" . . . means any individual who buys consumer goods . . . .
>
> . . . .
>
> (j) "Manufacturer" means any [person who] . . . manufactures, assembles, or produces consumer goods.

(Cal. Civ. Code § 1791.)

Thus, whenever sections of the Act discuss "buyer," "manufacturer," or "consumer goods" only new products are covered. (See also, Ralph J. Swanson, Comment, Toward an End to Consumer Frustration--Making the Song-Beverly Consumer Warranty Act Work, 14 Santa Clara Law, 575, 587-89 (1974).) The only used goods included within these definitions are "assistive devices sold at retail," which are devices designed to aid a physically disabled person. (See Cal. Civ. Code § 1791(a), (s).)

As indicated above, "used" consumer goods are explicitly covered in only two provisions of Song-Beverly. Section 1795.4, enacted in 1984, outlines the rules applicable to leases of "both new and used consumer goods." (Cal. Civ. Code § 1795.4.) Section 1795.5 discusses the obligations of distributors or sellers of used consumer goods who make express warranties. (Cal. Civ. Code § 1795.5.)

In contrast, most of Song-Beverly does not apply to used goods because of the

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definitions set forth in section 1791. For example, Section 1794 creates a cause of action, discusses the measure of damages, and provides rules for awarding attorneys' fees for violations of Song-Beverly. (See, Cal. Civ. Code § 1794.) However, the remedies outlined in section 1794 are only available to a "buyer of consumer goods," thus a buyer of new products. (*Id.*; Cal. Civ. Code § 1791.)

Applying these definitions to section 1793.2(d)(1), it is clear that used goods are not covered. The statute provides that, "the manufacturer shall either replace the goods or reimburse the buyer . . . ."(Cal. Civ. Code § 1793.2(d)(1).) According to the definitions found in section 1791, this rule only applies to manufacturers and buyers of consumer goods; that is, manufacturers and buyers of new products. (See Cal. Civ. Code § 1791.) Therefore, the sale of a used car is not covered under section 1793.2(d)(1).

Section 1793.2(d)(2) provides the repair and replace statute for new motor vehicles. The statute reads, in pertinent part:

> If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer. . . .

(Cal. Civ. Code § 1793.2(d)(2) (emphasis added).) The statute explicitly applies to new motor vehicles. One must look to section 1793.22(e)(2) for the definition of "new motor vehicle" for purposes of this statute.

The predecessor to section 1793.22 was originally enacted by the California Legislature in 1987.[9] It is known today as the Tanner Consumer Protection Act. A "new motor vehicle" is defined in section 1793.22(e)(2), which provides:

> 'New Motor Vehicle' means a new motor vehicle which is used or bought for use primarily for personal, family, or household purposes. 'New Motor Vehicle' includes . . . a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty.

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[9] See, Act of Sept. 28, 1987, ch. 1280, § 1, 1987 Cal.Stat. 4553 (amending Cal. Civ. Code § 1793.2); Act of Sept. 29, 1992, ch. 1232, § 7 (renumbering the section as Cal. Civ. Code § 1793.22).

(Cal. Civ. Code § 1793.22(e)(2).)

In issue in the underlying trial was what the legislature intended by this language: "'New Motor Vehicle' includes . . . a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." BMW contends that the legislature could not have intended for the language to mean the equivalent of "every motor vehicle sold with a any remainder of the manufacturer's new car warranty," as such an interpretation would be detrimental to the interests of consumers.

The interpretation of a statute and its application to a given set of facts are matters of law which are to be determined by the appellate court. (Haworth v. Lira (1991) 232 Cal.App.3d 1362, 1367.) This court is not bound by the trial court's interpretation of the statute. (*Id.*) Furthermore, the appellate court is not bound by the evidence presented at trial. (*Id.* (citing California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 699).)

1. THE DEFINITION OF "NEW MOTOR VEHICLE" FOUND IN THE TANNER CONSUMER PROTECTION ACT IS CLEAR AND UNAMBIGUOUS; THE LOWER COURT ERRED IN DETERMINING THAT RESPONDENT'S USED VEHICLE WAS A "NEW MOTOR VEHICLE"

Courts have a duty, within the framework of the statutes, to interpret them so as to make them workable and reasonable. (See, People v. Turner (1993) 15 Cal.App.4th 1690, 1696.) Nonetheless, rules of statutory construction are applicable only when the language of the statute is uncertain or ambiguous. (Scott v. McPheeters (1939) 33 Cal.App.2d 629, 631.) Where the language is clear and unambiguous, courts should not engage in construction. (Ornelas v. Randolph (1993) 4 Cal.4th 1095, 1105 n.8.) Instead, the court must follow the language used in the statute and attribute to it its plain meaning. (Wallace v. Dept. of Motor Vehicles (1970) 12 Cal.App.3d 356, 360.)

It is apparent on its face that Civil Code section 1793.22(e)(2) defines five types of vehicles explicitly considered to be new: the chassis, chassis cab, that portion of a motor home devoted to its propulsion, a dealer-owned vehicle and a demonstrator. (Cal. Civ. Code § 1793.22(e)(2).) Such a conclusion is apparent for several reasons.

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First, the statute contains a list of items separated by commas. The forth item ("dealer owned vehicle") and fifth item ("a 'demonstrator'") are separated by the word "and," without a comma. Where the word "and" is used in a statute, it ordinarily connotes a conjunctive meaning. (Houge v. Ford (1955) 44 Cal.2d 706, 712.) As such, it serves to connect the various items in the sentence.[10] Therefore, the legislature's decision to word the statute: "... a dealer owned vehicle and a 'demonstrator'. . ."suggests that "a 'demonstrator'" is the last item on the list and is joined with the preceding four items by a conjunction. (See Cal. Civ. Code § 1793.22(e)(2) (emphasis added).)

Second, the phrase "a 'demonstrator'" is then followed by the words: ". . . or other motor vehicle sold with a manufacturer's new car warranty." (Cal. Civ. Code § 1793.22(e)(2) (emphasis added).) The word "or"commonly implies a disjunctive or alternative meaning. (Houge, 44 Cal.2d at 712.) The use of the word "or" between the two phrases in section 1793.22(e)(2) provides for alternative terms to describe the concept of a "demonstrator" vehicle.[11] That is, a demonstrator includes certain new vehicles which are sold with a manufacturer's new car warranty. Such an interpretation is consistent with the fact that the term "demonstrator" is not exclusively used within the industry. Terms such as "factory executive model," "dealer model," and "demonstrator executive vehicle" are used synonymously with "demonstrator." Thus, while section 1793.22(e)(2) defines "demonstrator" as, "a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type," the phrase "or other motor vehicle sold with a manufacturer's new car warranty" also helps to define what is meant by the term "demonstrator." The only other reasonable interpretation of the language

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[10] "Conjunctive" is defined as: "Serving to connect elements of meaning and construction in a sentence." (Webster's II: New Riverside University Dictionary, 299 (1988, Riverside Publishing Co.).)

[11] "Alternative" is defined as "necessitating or allowing a choice between two or more than two things." (Webster's II: New Riverside University Dictionary, 96 (1988, Riverside Publishing Co.).) "Disjunctive" means "Serving to establish a relationship of contrast or opposition." (*Id.* at 386-87.)

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of the statute would be that the word "or" serves to disjoin the phrase "other motor vehicle sold with a manufacturer's new car warranty" from the preceding five items in the statute. As such, "other motor vehicles sold with a manufacturer's new car warranty" would be an alternative to all of the other items. While the first five items would be joined together by the word "and," the last item would be an alternative to the list. Such an interpretation hardly seems sensible. Why would the legislature intend to contrast "other motor vehicles sold with a manufacturer's new car warranty" from all of the other types of new motor vehicles? Instead, it is far more likely that the legislature meant for the word "or" to be conjunctive as between the phrases "a demonstrator" and "other motor vehicle sold with a manufacturer's new car warranty."

Third, the conclusion that the plain language of the statute uses the phrase "other motor vehicles sold with a manufacturer's new car warranty" as an alternative way to define "demonstrator" is supported by the Legislative Counsel's Digest. The Digest for the 1987 amendment does not discuss extending protection to all used cars with remaining coverage under a new car warranty; rather it merely notes the expanded coverage for and definition of "demonstrators." (See, Act of Sept. 28, 1987, ch. 1280, Legislative Counsel's Digest.) The Legislative Counsel surely would have noted a change in existing law so sweeping as to vastly expand the scope of Song-Beverly to include every used motor vehicle sold with remaining coverage under a new car warranty. (See also, Ibrahim v. Ford Motor Co. (1989) 214 Cal.App.3d 878, 885 n.6 (describing 1987 and 1988 amendments as merely adding "dealer-owned 'demonstrator' vehicles and certain portions of motorhomes" to the Act's coverage).)

Therefore, since the plain language of the statute is clear and unambiguous, the lower court erred in interpreting it to include coverage under Song-Beverly for a used car sold with the remainder of a manufacturer's limited warranty. Respondent's vehicle was clearly a used vehicle. The new car provisions of Song-Beverly were improperly applied against BMW in this case. Reversal of the verdict is appropriate.

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2. EVEN IF THE STATUTE IS AMBIGUOUS AS TO THE DEFINITION OF "NEW MOTOR VEHICLE," LEGISLATIVE INTENT DICTATES THAT RESPONDENT'S VEHICLE WAS NOT ENTITLED TO SONG-BEVERLY PROTECTION AS AGAINST THE MANUFACTURER

Where the statute is ambiguous, the court must interpret it to determine the legislature's intent in order that the purpose of the law is accomplished. (In re Christopher R. (1993) 6 Cal.4th 86, 91.) The courts give statutes a fair and reasonable interpretation, focusing on the language used and the purpose sought to be accomplished. (Stillwell v. State Bar of California (1946) 29 Cal.2d 119, 124.) If a construction will lead to conclusions not contemplated by the legislature, which occasion great inconvenience, inequality, or injustice, or which lead to absurd and unfair consequences, such a construction will be avoided. (San Joaquin & Kings River Canal & Irrig. Co v. Stevinson (1912) 164 Cal. 221, 229; Coates v. Shell Western E. & P., Inc. (1992) 5 Cal.App.4th 904, 915.) Statutes must be given a reasonable and common-sense construction that is in harmony with "the apparent purpose and intention of the lawmakers--a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity." (People v. Turner (1993) 15 Cal.App.4th 1690, 1696.) Where a statute may be interpreted more than one way, the one that leads to the more reasonable result will be followed. (Webster v. Superior Court (1988) 46 Cal.3d 338, 343.

Where the language of a statute is not clear, the intent of the legislature is determined by looking at all the circumstances, including the consequences that will flow from a particular interpretation. (Estate of Ryan (1943) 21 Cal.2d 498, 513.) The court may use extrinsic aids, such as the history of the statute, legislative debates and committee reports. (People v. Knowles (1950) 35 Cal.2d 175, 182.)

Thus the question in this matter is what the legislature meant when it amended the definition of "new motor vehicle" to that which is now found in Civil Code section 1793.22(e)(2). If the language of the statute is not clear and unambiguous, then the court should resort to extrinsic aids to interpret the legislature's intent. There simply is no extrinsic authority for the proposition that the legislature meant to change the definition of the statute

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so dramatically as to include every used motor vehicle sold with a remaining manufacturer's limited warranty. The Legislative Counsel's Digest is completely silent on the matter, as is all other extrinsic information available in the files entrusted to the Secretary of State.[12] In a letter to Governor George Deukmejian encouraging his signature on the bill, the bill's sponsor explains that the bill has two purposes: addressing when refunds are to be given, and certification of arbitration programs. (Letter from Assemblywoman Sally Tanner to Governor George Deukmejian of September 14, 1987 at 1.) (A copy of the letter is included herein as Exhibit 2.) Obviously, no mention is made of expanding the scope of Song-Beverly to include every car sold with a remaining manufacturer's limited warranty. She also tells the Governor that earlier opposition to the bill by automobile manufacturers and others had been alleviated after amendments. (*Id.* at 2.) It is inconceivable that the manufacturers would have supported or remained neutral on the bill if the definition of "new motor vehicle" had been expanded in the manner found by the lower court here. Further, an "Enrolled Bill Report" prepared for the Governor's office indicates, "The bill includes within the protection of the lemon law dealer-owned vehicles and "demonstrator" vehicles sold with a manufacturer's new car warranty." (Enrolled Bill Report on AB 2057, September 22, 1987, at 5.) (A copy of the report is included herein as Exhibit 3.) No mention is made of any broader definition of "new motor vehicle." Finally, the recommendation of the Department of Consumer Affairs in the Enrolled Bill Report notes that the bill would decrease costs to manufacturers, a result which clearly would not be possible if the intent of the bill was to expand manufacturer's liability under Song-Beverly to every vehicle sold with a remaining manufacturer's new car warranty. (*Id.* at 9.)

It is generally clear that the intent of Song-Beverly and the Tanner Consumer Protection Act is to protect consumers. Thus, when the court interprets this amendment to the Act, it must do so in such a way as to not cause great inconvenience, inequality, or

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[12] Appellants have completed extensive research using the records available at the California State Archives.

injustice. (San Joaquin & Kings River Canal & Irrig. Co v. Stevinson (1912) 164 Cal. 221, 229.) Applying the definition of "new motor vehicle" as interpreted by the lower court leads to such inconvenience, inequality, or injustice. A decision that used motor vehicles sold with the balance of a manufacturer's unexpired warranty are covered under section 1793.2 would be injurious and inconvenient to the interests of automobile consumers, the very group intended to be protected by Song-Beverly. Such a decision would increase the liability of manufacturers, thereby raising the costs of used cars to consumers. It would also lead to a decline in trade and commerce in this state.

The effect of the trial court's decision is that the high standards imposed by Song-Beverly will now be applied to vehicles for the entire life of the manufacturer's limited warranty. A vehicle might be owned by several persons over several years. Yet, if the vehicle has any portion of the manufacturer's new car warranty remaining, Song-Beverly would treat the car as "new."

An example helps to illustrate the result of the lower court's holding. If the warranty on a vehicle is three years or 36,000 miles, a car which is 35 months old, has 35,995 miles on the odometer, and for which a depreciated used-car price had been paid by a subsequent owner will still be a "new" car. Thus while the laws of nature recognize that mechanical items wear over time, Song-Beverly apparently would not. The subsequent owner would have the benefit of all of Song-Beverly's generous presumptions, without having undertaken the same risks as the purchaser of a really new car. Further, while the subsequent purchaser (perhaps third or fourth in the line of owners) will receive the benefit of these presumptions, the manufacturer will find it tremendously more difficult to raise defenses under Song-Beverly--such as the defense that the owner used the vehicle unreasonably--because it will be harder to trace multiple owners and determine their use or abuse of the vehicle. Manufacturers will be exposed to greatly increased liability. The liability of manufacturers to pay damages and a civil penalty would clearly be staggering. Consumers will be hurt when manufacturers react to limit the new exposure. This could not have been the result intended by the legislature when it amended the Tanner Consumer Protection Act.

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The result of applying Song-Beverly's new car provisions to used cars sold with the remainder of a new car warranty is different than allowing a subsequent purchaser to bring a traditional cause of action for breach of express warranty. Not only is the owner granted significant presumptions in his favor, there is also a potential for him to receive a civil penalty of two times the actual damages. If the underlying purpose of Song-Beverly is to protect consumers who make a major purchase of a new vehicle, the new car provisions of Song-Beverly should not be applied to used vehicles just because some portion of the express warranty exists. The subsequent purchaser has not paid a new-car price, has not purchased the vehicle expecting a "new" car, and should be required to proceed under traditional contract law or the used car provisions of Song-Beverly.

If the trial court's interpretation were followed, it is evident that the practical difficulties, inconvenience, hardships, and gross unfairness to manufacturers would be onerous and wholly unprecedented under traditional contract law. Alternatives would be for manufacturers and their selling dealers doing business in this state to either: (1) demand higher prices for cars that are used cars under the Vehicle Code[13] in order to reflect the costs of this potentially unlimited exposure; or (2) shorten warranties to the statutory minimum period. These alternatives would inevitably result in a manifest decline in trade and commerce in this state, creating great inconvenience for consumers. It is improbable that the legislature intended this highly intractable result. Therefore, the lower court erred in its construction of the legislative intent of the statute. The result of the trial court's ruling should be reversed.

3. IF THE TANNER CONSUMER PROTECTION ACT WERE READ SO AS TO INCLUDE RESPONDENT'S VEHICLE AS A "NEW MOTOR VEHICLE" IT WOULD CREATE AN UNTENABLE CONFLICT WITH THE VEHICLE CODE

When construing statutes that govern the same area of law, a specific statute relating to a particular subject will govern in respect to that subject as against a general

[13] The applicable portions of the Vehicle Code are discussed *infra*, section I.A.3.

statute. (See, People v. Squire (3d Dist., 1993) 15 Cal.App.4th 235, 240.) Still, the statutes and codes blend into each other and should be viewed as constituting a single statute. (See, *Id.*) A court should endeavor to view the statutes as parts of a whole system which must be harmonized. (*Id.*) Every section should be given effect. (*Id.*) Two statutes should be reconciled and construed in a manner which will uphold both of them if it is reasonably possible to do so. (*Id.* at 240-241.)

In this matter, there is irreconcilable conflict between the California Vehicle Code and the lower court's determination that, under Song-Beverly respondent's vehicle was a "new motor vehicle." Vehicle Code Section 665 defines a "used vehicle" as a:

> [V]ehicle that has been sold, or has been registered with the department, or has been sold and operated upon the highways, or has been registered with the appropriate agency or authority, of any other state, District of Columbia, territory or possession of the United States, or foreign state, province, or country, or unregistered vehicles regularly used or operated as demonstrators in the sales work of a dealer or unregistered vehicles regularly used or operated by a manufacturer in the sales or distribution work of such manufacturer.

(Cal. Veh. Code § 665.) In contrast, Vehicle Code section 430 defines a "new vehicle" as:

> [A] vehicle constructed entirely from new parts that has never been sold or registered with the department, or registered with the appropriate agency or authority, or sold and operated upon the highways of another state, District of Columbia, territory or possession of the United States, or foreign state, province, or country.

(Cal. Veh. Code § 430 (emphasis added).) Thus, it is clear under the vehicle code that once a vehicle has been registered in California or another state, that vehicle is not a "new vehicle" for purposes of the Vehicle Code.

Here, it is undisputed that the subject automobile had been previously owned and registered in the State of New Jersey. (Exhibit 2, 6.) Respondent executed documents indicating that she was purchasing a used motor vehicle, and not a new motor vehicle, with 7,565 miles on the odometer. (Exhibit 11, 78.) Therefore, respondent's vehicle was a "used vehicle" under the applicable vehicle laws of this state. (See, Cal. Veh. Code §§ 430, 665.)

Nonetheless, the trial court ruled that respondent's used vehicle was a new vehicle under Song-Beverly, and particularly the Tanner Consumer Protection Act. (RT 8-19, 542, 691-92, 696-97; CT 747-48.) The conflict between such a reading of Song-Beverly and the

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definition in the Vehicle Code is immediately apparent. Under the applicable section(s) of the Vehicle Code discussed above, BMW could not have called the subject vehicle "new" for any reason. By statute, respondent's vehicle was used since it had been previously registered. Thus, this vehicle was not the same as a "demonstrator" vehicle which would not have been previously registered with the State of New Jersey. For this reason, it would contravene the principle that statutes should blend together to hold that, respondent's vehicle was new under Song-Beverly even though it was used under the Vehicle Code. The most logical method for reconciling this conflict is to hold that a "new motor vehicle" under Song-Beverly is not one which has been previously registered. Instead, the language "or other motor vehicle sold with a manufacturer's new car warranty" should be interpreted to be an alternative way of describing "demonstrator" for purposes of the Act. This interpretation will allow the Vehicle Code and Song-Beverly to coexist without making manufacturers subject to different standards.

4. LEMON LAWS OF OTHER STATES TYPICALLY DO NOT EXPAND COVERAGE TO USED VEHICLES

The "lemon laws" of most states are similarly limited to new vehicles. (See, Task Force of the A.B.A. Subcomm. on General Provisions, Sales, Bulk Transfers, and Documents of Title, An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group, 16 Del. J. Corp. L. 981, 1003 (1991).) States that do provide coverage for used car buyers generally enact a separate statute which typically affords less protection for used car buyers than for new car buyers. (See, e.g., Conn. Gen. Stat. § 42-220 through 42-226 (1987) (providing maximum coverage of 60 days or 3,000 miles) (The statute is included herein as Exhibit 4.).)

Similarly, courts in other states have interpreted consumer protection statutes to determine what is a used vehicle. In the Oregon case of Weigel v. Ron Tonkin Chevrolet Co. ((1984) 690 P.2d 488) the court found that whether particular goods were new or used depended upon at least two elements: the significance of the actual physical "use" of the automobile; and, the significance of prior transactions involving the vehicle. (*Id.* at 490-91.)

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The court held that a vehicle is "used" for purposes of a consumer protection statute if the dealer previously gave any person legal possession of the automobile for that person's discretionary use for his own purposes beyond the limited purpose of a test-drive before a contemplated purchase. (*Id.* at 491; See also, 59 ALR4th 1192, 1198-99 (discussing Weigel).)

Extending the Weigel court's logic to the present situation, respondent's vehicle should be considered "used." The vehicle was received by respondent with 7,565 miles on it, demonstrating that there had been significant actual physical use of the vehicle prior to her purchase. Further, the vehicle's previous registration in New Jersey would certainly be a significant prior transaction involving the vehicle.

B. RESPONDENT HAD NO CAUSE OF ACTION AS AGAINST BMW UNDER SONG-BEVERLY; AN EXPRESS WARRANTY MADE BY A DEALER DOES NOT IMPOSE LIABILITY ON A MANUFACTURER

Under Song-Beverly, it is evident that express warranties made by a dealer in connection with the sale or lease of a used motor vehicle do not impose liability on the manufacturer. Section 1795.5 of the Civil Code regulates the making of express warranties on used consumer goods. It provides, in pertinent part:

> Notwithstanding the provisions of subdivision (a) of Section 1791 defining consumer goods to mean "new" goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturer's under this chapter except:
>
> (a) It shall be the obligation of the distributor or retail seller making express warranties with respect to used consumer goods (and not the original manufacturer, distributor, or retail seller making express warranties with respect to such goods when new) to maintain sufficient service and repair facilities within this state to carry out the terms of such express warranties.

(Cal. Civ. Code § 1795.5.)

It is well established that when a manufacturer puts an express warranty on a product, it is a promise or guarantee that certain things are true. (See, Black's Law Dictionary (5th. ed. 1979), at 1423; 3 Witkin, Summary of California Law (9th. ed. 1987) Sales, §55, p. 50.) "Any . . . promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will

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conform . . . to the promise." (See, Cal. Com. Code § 2313(1)(a).)

The manufacturer of a motor vehicle, when it gives an express warranty, promises that the vehicle is free from defects, and will remain defect-free for the duration of the warranty. (Gherna v. Ford Motor Co. (1966) 246 Cal.App.2d 639, 651.) Moreover, where the purchaser of a product relies on representations made by the manufacturer, recovery is allowed on the express warranty absent a showing of privity. (Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal.App.3d 951, 957 (citing Burr v. Sherwin Williams Co. (1954) 42 Cal.2d 682, 696).)

Here, BMW never made express representations to respondent that the remainder of the manufacturer's new car warranty would be applied to her vehicle. At the time of the lease, respondent was informed that she was purchasing a "used" automobile, in spite of the fact that sales personnel of the leasing dealer apparently represented to respondent that the unexpired portion of the manufacturer's original limited warranty would be applicable to the vehicle. (RT 50.)[14] The manufacturer's limited warranty did not provide for, nor did it explicitly state that, the warranty would be applicable to subsequent retail purchasers. (Exhibit 13.) Therefore, there was no privity between BMW and respondent. The original new car warranty was not applicable and BMW did not give respondent an express warranty at the time of lease.

Although the dealer may have represented to respondent that the vehicle was covered by a warranty, the dealer's potential liability under section 1795.5 does not suggest that the manufacturer shares any liability under Song-Beverly. In fact, the statute clearly establishes the contrary position. (See, Cal. Civ. Code § 1795.5.) The logic behind this statutory scheme is clear. Once a seller warrants a used good in order to sell or lease it, and such a warranty becomes part of the basis of the bargain, the law requires the seller to honor

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[14] The original limited warranty for the vehicle covered, "defects in material or workmanship for a period of three years or 36,000 miles, whichever occur[red] first, commencing with the date the vehicle [was] first licensed or placed in service as a 'demonstrator' or 'company' car." (Exhibit 13.)

that warranty. In contrast, when a used good is resold or leased, the manufacturer has not made any new warranties absent an explicit representation from the manufacturer to the buyer or lessee of the used goods at the time of sale. Thus, the manufacturer is only held accountable to the original retail buyer or lessee in privity with it, not to subsequent buyers. Here, respondent was not in privity with the manufacturer. Therefore, while the dealer who leased respondent her BMW may be liable under Song-Beverly, the manufacturer is not.

C. RESPONDENT IS NOT LEFT WITHOUT REMEDIES IF SONG-BEVERLY IS NOT APPLICABLE AS AGAINST THE MANUFACTURER

Interpreting section 1793.22(e)(2) to not include a used vehicle such as respondent's does not leave consumers unprotected. Rather, the consumer still has Song-Beverly protection under section 1795.5 which places obligations on the distributor or retail seller of used consumer goods in which an express warranty is given. (See, Cal. Civ. Code § 1795.5.) If the manufacturer has made a new express warranty, Song-Beverly will apply against the manufacturer as well. (See, Cal. Civ. Code § 1793.2.) The consumer also has whatever traditional contract law remedies might be applicable to her unique fact situation. It is clear, therefore, that the consumer has avenues of protection available to her without unduly burdening manufacturers in such a way that the result will be increased costs to the consumer.

It is a fallacy to believe that calling respondent's vehicle "used" will result in her having no remedy for any wrong which might have been done to her. Rather, she must pursue those remedies without the benefit of the generous presumptions afforded consumers under Song-Beverly. Instead, to pursue a claim against the manufacturer here, respondent should have to show that her used vehicle was covered by an express warranty by the manufacturer, or that she has some contractual cause of action against the manufacturer. In fact, there was no express warranty made by BMW to respondent. It was improper for the lower court to rule that respondent's vehicle was a new motor vehicle. Since the Tanner Consumer Protection Act does not provide a remedy to the lessee of a used motor vehicle, reversal is appropriate.

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II. THE SPECIAL VERDICT FORM PRESENTED TO THE JURY WAS FATALLY DEFECTIVE IN THAT IT FAILED TO ASK THE JURY IF BMW HAD VIOLATED THE SONG-BEVERLY CONSUMER WARRANTY ACT

The special verdict form presented to the jury in this case was defective in that the jury was never asked to decide whether BMW was liable under Song-Beverly. Instead, the jury likely believed that it had only the task of determining what amount of damages should be awarded to respondent.

If a verdict is hopelessly ambiguous, hopelessly inconsistent or incomprehensible, a reversal is required. (See, Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal.2d 452, 457; Mixon v. Riverview Hospital (1967) 254 Cal.App.2d 364, 375.)

Whether or not to allow a special rather than a general verdict is a matter within the trial judge's discretion. (Cal. Code Civ. Proc. § 625.) Once it is determined that a special verdict will be rendered, the verdict form must ask the jury to rule on all the issues by presenting the conclusions of fact bearing on those issues. (People v. Davenport (1985) 41 Cal.3d 247, 273 (citing Sanderson v. Estate (1887) 74 Cal. 199).) A special verdict form is incomplete if it asks the jury to answer only some of the issues presented by the evidence, and there is no general verdict. (Montgomery v. Sayre (1891) 91 Cal. 206, 210.) Code of Civil Procedure section 624, authorizing the special verdict, states, in relevant part:

> The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

(Cal. Code Civ. Pro. § 624.)

Unlike a general verdict, which merely implies findings on all issues in favor of the prevailing party, a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that, "... nothing shall remain to the court but to draw from them conclusions of law." (Cal. Code Civ. Proc. § 624.) The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete

special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings. . . ."(Cal. Judges Benchbook (CJER 1981) Civil Trials, § 15.10, p. 473.) If a verdict does not resolve all liability issues, it should not stand. (Falls v. Superior Court (1987) 194 Cal.App.3d 851, 855.)

Here, the verdict form was fatally incomplete in that it failed to submit the primary issue of BMW's liability under Song-Beverly to the jury for resolution. The form should have asked first, "Did Defendant violate the Song-Beverly Warranty Act?" In the absence of this question there was no finding by the jury on the ultimate issue of whether BMW violated Song-Beverly. Although the first question of the special verdict form read, "What is the total amount, if any, of actual damage . . . ."the inclusion of the phrase "if any" was not sufficient to insure the jury first considered the issue of BMW's ultimate liability. The special verdict form as it was presented fails to guarantee that the jury considered whether or not BMW was liable under Song-Beverly.

Instead, the form first assumed that BMW was liable for damages. (CT 129-30.) The special verdict form then questioned whether the assumed violation of Song-Beverly was "wilful." This second question is the only one submitted which addresses the issue of liability in any way. Still, it does not directly ask the jury whether BMW was generally liable under Song-Beverly. It is no answer to suggest that the question asking if a "wilful" violation took place is sufficient to insure the jury considered the issue of liability; having not been asked first to establish liability, the jury may well have believed that they had no other choice but to conclude that BMW acted wilfully. The specific finding of wilfulness is then called into question as well. Because the verdict is fatally incomplete, confusing and vague, it is prejudicial. Reversal is in order.

III. THE JURY WAS IMPROPERLY INSTRUCTED ON THEORIES OR DEFENSES WHICH WERE ADVANCED BY BMW AND WHICH WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

The law is well settled that a litigant is entitled to jury instructions on every theory which he advances and which is supported by the evidence. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 543 (citing Phillips v. G.L. Truman Excavation Co. (1961) 55 Cal.2d

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801, 806).) "It is inherently prejudicial error for a trial court to refuse to give instructions covering [a party's] theor[y] of the case which [is] supported by substantial evidence." (Williams v. Carl Karcher Enterprises, Inc. (1986) 182 Cal.App.3d 479, 490 (quoting Ng v. Hudson (1977) 75 Cal.App.3d 250, 261) (emphasis added).) A party has a right to independent jury consideration of each of its theories supported by the evidence and presented by the jury instructions. (Hasson, 19 Cal.3d at 544.) Moreover, the failure to give an instruction is prejudicial where "... it is reasonably probable that a result more favorable to defendants would have been reached if the instructions had been given." (Dawkins v. City of Los Angeles (1972) 22 Cal.3d 126, 135, (citing Cal. Const., art VI, § 13); People v. Watson (1956) 46 Cal.2d 818, 836.)

"Generally, 'if it appears that error in [refusing to give a proper instruction] was likely to mislead the jury and thus become a factor in its verdict, it is prejudicial and ground for reversal.'" (Williams, 182 Cal.App.3d at 489, (quoting Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 670).) Thus, it is error to fail to instruct on a key theory which reasonably may be the basis of a jury's decision. "'The determination whether, in a specific instance, the probable effect of the instruction [or refusal to give a proper instruction] has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all of the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn.'" (See, Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 335 (quoting Butigan v. Yellow Cab Co. (1958) 49 Cal.2d 652, 660-61) (emphasis in original); see also, Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1054.)

Among the factors to be considered by the court in measuring the likelihood of whether a jury has been misled are: (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error. (LeMons v. Regents of University of California

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(1978) 21 Cal.3d 869, 876.) It is not necessary that all five factors be dispositively involved for a court to conclude that there has been prejudicial error requiring reversal. (See, Mock, 4 Cal.App.4th at 335-36, n.34.)

Further, in evaluating prejudicial error, it is well-settled that the court "... must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject, the jury might have rendered a verdict in favor of the losing party. [citations]" (Williams, 182 Cal.App.3d at 489 (emphasis in original).) In other words, "'... where it seems probable that the jury's verdict may have been based on [an] erroneous instruction prejudice appears and this court 'should not speculate upon the basis of the verdict' [citations].'" (See, Mock, 4 Cal.App.4th at 335.)

A. THE CIVIL PENALTY INSTRUCTION WAS ERRONEOUS IN THAT THE JURY WAS NOT INSTRUCTED ON EACH OF THE RELEVANT FACTORS

The trial judge failed to read a portion of the jury instructions regarding whether BMW reasonably believed that the vehicle conformed to the applicable express warranty and that there were no unresolved problems with the vehicle. (RT 671.) Counsel immediately brought this omission to the court's attention. (RT 671.) The judge believed that he had read the instruction and told the jury they should read the instructions themselves. (RT 671-672.)

It seems highly unlikely that the jury read the instructions regarding the factors necessary to find a wilful violation of Song-Beverly. More than 100 exhibits were entered into evidence at trial and all were sent in with the jury. Additionally, the jury instructions consumed approximately 53 pages. In spite of these voluminous documents, the jury returned its verdict in less than three and one-half hours.[15] Moreover, referring the jury to the written instructions for their private review was not sufficient to ensure that the jury was properly

[15] This quick verdict may partially be explained by the fact that there was no initial question of liability presented to the jury on the special verdict form.

instructed on the factors necessary to find that BMW had wilfully violated Song-Beverly.

The element of the instruction on wilful violation of Song-Beverly which was omitted was of key importance to the defense. In fact, it was the basis of BMW's case. The error in refusing to give a proper instruction was likely to mislead the jury and thus likely became a factor in its verdict. The error is therefore prejudicial and is a ground for reversal. (See, Williams, 182 Cal.App.3d at 489.)

Evidence was presented on the point addressed by the omitted instruction. (See, section V.B., *infra*.) Both respondent's and BMW's experts testified that reasonable repairs were made on the subject vehicle. (RT 230, 510, 512, 524, 525, 531.) Testimony by Roseville BMW's service manager also demonstrated that he was not aware of evidence suggesting that the alleged problems with respondent's vehicle went unresolved. (RT 437-438.) Finally, respondent testified that the vibration problem would disappear after each repair, usually for several months. (RT 72, 133, 144.)

As in Williams, the jury should have been permitted to weigh this evidence in accordance with the appropriate instructions. It is inherently prejudicial for a trial court to not instruct on one party's theory of the case which is supported by substantial evidence. (Williams, 182 Cal.App.3d at 490.) The failure of the court to instruct the jury on a key element in determining wilfulness was prejudicial and mandates reversal.

B. BMW'S PROPOSED INSTRUCTION REGARDING WARRANTY RIGHTS OF LESSEES OF USED VEHICLES LEASED BY A DEALER WITH THE BALANCE OF A MANUFACTURER'S NEW CAR WARRANTY WAS IMPROPERLY REJECTED BY THE TRIAL COURT

BMW submitted an instruction concerning the warranty rights of lessees of used vehicles leased by a dealer with the balance of a manufacturer's new car warranty. This instruction was summarily rejected by the court. (CT 240-41.) The instruction was critical to the defense. In fact, it formed the basis of BMW's case. As indicated by element No. 3 thereon, BMW's liability under Song-Beverly was entirely contingent upon respondent meeting her burden of proof in first establishing that she was the lessee of a new motor

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vehicle. (See also, section I, *supra.*) This instruction would have correctly informed the jury that a manufacturer cannot be held liable under Song-Beverly unless it is first established that respondent had leased a new motor vehicle.

Here, there was ample uncontroverted evidence adduced at trial to establish that respondent had, in fact, leased a used motor vehicle; a vehicle not intended by the legislature to be covered under relevant sections of Song-Beverly imposing liability on manufacturers. (See also, section I, *supra.*) No similar or substitute instructions were given by the court to address this pivotal issue. Because the jury's verdict was wholly dependent on whether or not respondent's vehicle was a "new motor vehicle," it is likely that a result more favorable to BMW would have been reached if the instruction had been given to the jury. In refusing this instruction, the court failed to properly instruct the jury as to a critical element of BMW's case. BMW was prejudiced by this error, which mandates reversal.

C. BMW'S INSTRUCTION REGARDING THE BURDEN OF PROOF FOR A CAUSE OF ACTION OF AN EXPRESS WARRANTY FOR A NEW MOTOR VEHICLE WAS IMPROPERLY REJECTED BY THE TRIAL COURT

BMW submitted an instruction entitled "Burden of Proof and Preponderance of Evidence - Cause of Action for Breach of Express Warranty for New Motor Vehicle." (CT 245-246.) This instruction was refused by the court. Instead, the court adopted and read to the jury an overgeneralized and inaccurate instruction substantially identical to that proposed by respondent. (RT 667-68; CT 172.)

This instruction given by the court was prejudicially deficient in several respects. First, the instruction as given failed to mention that respondent must first prove by a preponderance of the evidence that she was the lessee of a "new motor vehicle." (RT 667-668; CT 172.) (See also, section I., *supra.*)

Second, the instruction as given was inherently misleading and ambiguous. As evidenced by element Nos. 2 and 3 thereon, the instruction indicated that respondent was required to notify the manufacturer of a breach of warranty before first proving that the manufacturer had actually breached the express warranty by failing to conform the vehicle

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to the applicable express warranty after a reasonable number of repair attempts. (RT 667-668; CT 172.) In effect, this instruction blatantly assumes that a breach has occurred. It only requires notice to the manufacturer to make the breach effective--before any such breach is actually proven. Interestingly, this error appears to be consistent with the special verdict form, which assumed that a breach had occurred before it had been proven to have occurred. (See also, section II; *supra*.)

Similarly, the instruction as given was overgeneralized and incomplete insofar as it makes no mention of the obvious requirement that any breach of warranty must have occurred within the applicable warranty period. (RT 667-668; CT 172.) The elements of breach of warranty, notice of breach, and breach occurring within the warranty period were important to the defense because those elements must be evaluated and found by the jury to be facts before BMW can be found liable under Song-Beverly for breach of an express warranty. Substantial evidence was presented at trial by BMW to corroborate its theory that it had not breached any alleged applicable express warranties by failing to conform respondent's vehicle to the warranty after a reasonable number of repair attempts. (See, section IV; *infra*.) As such, the jury should have been permitted to weigh this evidence with the aid of appropriate, accurate instructions. In the incomplete verdict form, the jury did assess damages for breach of warranty under Song-Beverly. The failure to properly and accurately instruct the jury as to this key issue of burden of proof was prejudicial and mandates reversal.

IV. NO SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT FOR RESPONDENT

Generally, an appellate court will not disturb a lower court's ruling on conflicting evidence if there is "evidence of a substantial character which reasonably supports the judgment." (Fewel & Dawes, Inc. v. Pratt (1941) 17 Cal.2d 85, 89 (emphasis added).) Nonetheless, if the evidence is "so slight and tenuous that it does not create a real and substantial conflict the finding may be set aside." (*Id.*) The term "substantial" means "more than 'a mere scintilla,'" and "such relevant evidence as a reasonable [person] might accept as

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adequate to support a conclusion.'" (Estate of Teed (1952) 112 Cal.App.2d 638, 644.) The Teed court further explained the term "substantial" as such:

> [I]f the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.

(*Id.*) Thus a trial judge may be reversed where the appellate court finds that there was not substantial evidence in support of the respondent's position.

In Oldenberg v. Sears, Roebuck & Co. the court reversed an earlier judgment for the respondent in an action for personal injuries sustained when respondent stepped and fell on a piece of chalk on a sidewalk adjacent to defendant's store. (Oldenberg v. Sears, Roebuck & Co. (1957) 152 Cal.App.2d 733, 749.) The court found that the jury could only have reached its verdict "upon the basis of conjecture, speculation or guess." (*Id.* at 743.) The evidence did not support the verdict and it was reversed with instructions to the trial court to grant defendant's motion for judgment notwithstanding the verdict. (*Id.* at 749.)

The court also reversed the judgment in Crawford v. Continental Cas. Co.. ((1968) 261 Cal.App.2d 98.) Respondent had sought and obtained declaratory relief to determine the annual premium of his insurance policy. The court found no "substantial evidence" to support the trial court's findings and judgment. (*Id.* at 104 (emphasis in original).) The only evidence tending to support the judgment was the testimony of the respondent. (*Id.* at 102.)

In Krause v. Apodaca, the court reversed the jury verdict for defendant in an action brought against a tenant for damages for negligence resulting in a fire in the leased premises. (Krause v. Apodaca (1960) 186 Cal.App.2d 413, 420.) The only evidence to contradict three experts who all agreed that the cause of the fire was defendant's failure to disconnect a hot plate was respondent's inference that a switch existed for turning off the hot plate. (*Id.* at 419.) The court reflected that, "there must be more than a conflict of words to constitute a conflict of evidence" and found defendant's inference was not substantial evidence. (*Id.*)

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In the instant matter, respondent failed to present substantial evidence to support a jury finding that BMW violated Song-Beverly: testimony by both respondent's and BMW's experts supports the position that BMW adequately repaired respondent's vehicle; the evidence is uncontroverted that respondent failed to provide routine maintenance for the subject vehicle; testimony by both experts supports the conclusion that respondent could have caused the damage to her brakes and the resulting shuddering feeling.

A. THE TESTIMONY OF BOTH RESPONDENT'S AND BMW'S EXPERTS, AS WELL AS THAT OF OTHER WITNESSES, DEMONSTRATES THAT BMW'S REPAIRS TO THE VEHICLE WERE ADEQUATE

California Civil Code section 1793.2(d)(2) provides that a manufacturer who gives an express warranty on a new motor vehicle must service or repair such a vehicle to conform to the express warranty. (Cal. Civ. Code § 1793.2(d)(2).) Failure to do so permits the consumer to seek replacement or restitution. (*Id.*) Implicit in the language of the statute is that it is the plaintiff consumer's burden to demonstrate that the defendant manufacturer has not serviced or repaired the vehicle to conform to the express warranty.

In the instant case, respondent failed to present substantial evidence in support of her claim that the repairs made by BMW did not conform the vehicle to the terms of the express warranty. In fact, both respondent's expert and BMW's expert testified that the repairs made were reasonable and adequate.

Thomas L. Stark, respondent's expert, testified on cross-examination that the repairs made by BMW were reasonable in light of the situation. (RT 248.) Further, he testified that any vibration in the braking system would "go away" for 5,000 to 7,000 miles following replacement of the rotors, calipers and pads. (RT 230.)

Peter S. Barron, BMW's expert, a BMW Master Technician with more than twenty-three years of general automotive repair experience and fifteen years experience with BMW automobiles, also testified regarding the service performed by BMW. Mr. Baron testified that the service performed on respondent's automobile was appropriate given her complaints. (RT 510, 512, 524, 525, 531.) In essence, BMW was trying to modify the vehicle

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in order to compensate for respondent's abusive driving habits and lack of attention to maintenance. (RT 341, 483, 516, 529-30, 531, 570, 576.)

Mr. Christopher J. Hearty, Service Manager for Roseville BMW, testified regarding repairs to respondent's vehicle. On redirect examination, Mr. Hearty testified that he knows of no evidence to indicate that the repairs made by BMW did not solve respondent's complaints, and that the problem could have redeveloped in between visits. (RT 437-438.) On cross examination, he appeared to testify that the brake shimmy problem could not be solved. (RT 434.) However, the redirect examination is more compelling since BMW's counsel's question was framed more clearly. (RT 437.)[16] Further, Mr. Hearty unequivocally testified that there was no brake defect. (RT 434.)

Respondent testified that the vibration would disappear after the car was serviced by BMW. (RT 72, 133, 144.) She indicated that after the March 1989 repair, she started feeling the shimmy "a little bit at first intermittently" and brought the car in for service in July 1989, some four months later. (RT 133.) Then, the problem only slowly returned between April 1990 and August 1990, another four month period. (RT 144.) Respondent testified that after the vehicle was repaired in January 1991, she did not start to feel vibration again until the summer; clearly at least five months later. (RT 72.) Thus, respondent's own testimony fails to illicit substantial evidence that the vehicle was not adequately repaired.

The evidence is consistent on both sides of the case that respondent's complaints were resolved each time. There is, therefore, no real or substantial conflict in the evidence regarding the adequacy of the service performed by BMW. All parties agree that BMW adequately repaired any problems in the subject vehicle.

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[16] "Q: Do you have any evidence to indicate that these repairs did not take care of the problem?"

"A: Not that was brought to me, to my attention." (RT 437.)

B. IT WAS SHOWN BY SUBSTANTIAL EVIDENCE THAT BRAKE SHIMMY WAS NOT A RESULT OF ANY DEFECT; RESPONDENT'S DRIVING STYLE CAUSED THE PROBLEM

California Civil Code section 1794.3 provides that Song-Beverly does not apply to "any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale." (Cal. Civ. Code § 1794.3.) In the instant case, BMW presented substantial evidence that respondent's abusive driving style was unreasonable and caused any nonconformity with the brakes on the subject vehicle. This evidence was not effectively rebutted. Further, BMW has shown by substantial evidence that respondent's lack of maintenance of the vehicle was unreasonable use of the vehicle. Again, this testimony was not rebutted.

Respondent testified that she was informed in July 1989 that a problem existed with the brake rotors which were in need of replacement. (RT 137.) In July 1990 she was informed that the rotors were again in need of replacement as they were warped. (RT 142.) Respondent testified that she was not told she was the cause of the rotor problem, but she offered no testimony as to any other cause; rather she testified only to the fact that new parts being placed on the vehicle were of a new material. (RT 142.) Testimony of the respondent regarding repairs in August 1990 indicates that she was told there was a torn caliper boot, a scored brake piston, and hot spots on the rotors, all requiring replacement. (RT 148.) Although respondent testified that she was never told by BMW that her driving style could have affected brake usage or brake pad wear, she also has not presented any evidence that the problem was caused by any other force. (RT 590.) Therefore, respondent's own testimony fails to present substantial evidence that she did not unreasonably use the vehicle. Further, respondent has not presented substantial evidence through any other means.

Respondent's testimony also indicates that she did not provide proper maintenance on the subject vehicle. She testified that she took the vehicle to a "Jiffy Lube" type of location on one occasion and that otherwise her husband changed the car's oil. (RT 100-01.) She testified that she never had a 30,000 mile inspection performed on the vehicle,

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nor does she specifically recall having had it done elsewhere, though she believes it was either taken elsewhere or her husband did the service. (RT 161.) However, **Mr. Kenneth C. Scott**, respondent's current husband, testified that the only maintenance he performed on the vehicle was oil changes. (RT 267-68.) He never performed a tune-up or flushed the brake system, nor did he ever have such maintenance done anywhere else. (RT 268-69.)

Mr. Thomas L. Stark, respondent's expert, testified that he observed respondent's driving habits during a prearranged inspection. (RT 184-85, 212-14.) Although Mr. Stark testified that he did not observe her "riding the brakes," he also admitted that respondent was driving under conditions intended to create the shuddering effect she wanted him to observe. (RT 185, 213-14.) Mr. Stark in effect admitted that he was not observing the respondent driving under normal conditions. Also, respondent clearly must have known that she was being observed, even if Mr. Stark did not explicitly tell her that he would be observing her style of driving. Mr. Stark's testimony can hardly be considered substantial evidence of the fact that respondent's normal, daily driving style could not have been an unreasonable cause of the recurring warped rotors and other brake problems.

In fact, respondent made no attempt to seek testimony from any other person regarding her daily driving habits. Thus, she wholly failed to meet the burden upon her to demonstrate by substantial evidence that she did not use the vehicle unreasonably.

On the other hand, BMW produced overwhelming evidence that respondent's abusive driving habits were an unreasonable use of the vehicle, and that respondent had been so informed, if only in delicate language.

Mr. Peter H. Kanae, Jr., formerly a service writer for Roseville BMW/Suburu and now a general service manager for a Japanese car care center, testified that he informed respondent that her vehicle's problems were being caused by excessive braking which created a lack of heat dissipation. (RT 341.) Although he testified that he spoke in general terms so as not to "point a finger" at the respondent, it is clear that he demonstrated to respondent that she was unreasonably using her vehicle, causing the vibration in the braking. (RT 341.) It should be noted that Mr. Kanae is not an employee of BMW and is the most unbiased

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witness testifying in the entire trial, for either respondent or defendant.

Mr. Peter S. Barron, BMW's expert, testified that numerous inspections by Mr. Barron and BMW service technicians indicated that respondent's style of driving was the cause of her brake problems. Mr. Barron conducted an inspection of the subject vehicle in December 1991 and observed that the rotors were "very bright blue in color, indicating that there had been a significant amount of heat generated" during the use of the vehicle's brakes. (RT 481.) His second inspection of the vehicle in October 1992 again turned up heavily blued rotors. (RT 496.) Further, he testified that numerous repair orders from Roseville BMW/Suburu over the years indicated that service personnel repeatedly had determined that the rotors had hot spots and needed to be replaced. (RT 510, 511, 516.) Mr. Barron's expert opinion is that respondent's driving style and the usage of the vehicle--where and how it was being driven--were the cause of the repeated rotor problems. (RT 483, 570.) This pattern of brake usage combined with a lack of proper maintenance produced an intermittent harmonic resonance vibration which manifested itself under very specific situations such as freeway driving. (RT 529-31.)

Mr. Barron also testified regarding respondent's lack of proper maintenance on the vehicle. Mr. Barron's two inspections of the vehicle both determined that the service interval indicator was illuminated on respondent's vehicle. (RT 475, 485.) The purpose of the indicator array is to alert the driver to the need for maintenance of the vehicle. (RT 476.) Further, an inspection by him of the service booklet in October 1992 indicated that there had been an inadequate amount of maintenance and service on the vehicle for the actual mileage driven. (RT 507.) This second inspection also disclosed: after-factory tires were inadequate in their performance ratings; the transmission fluid was dark in color and had not been properly serviced; an oil leak in the cylinder head was leaking on the engine mounts, causing degradation of the motor mount; tire pressure among the tires was uneven; and the left side wheels were dimensionally different than those on the right side. (RT 488, 492, 493, 496, 497, 530.) Mr. Barron testified that the vehicle "was not anywhere close to being properly maintained." (RT 527.) In Mr. Barron's expert opinion, the unequal wheels, improper tires,

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degradation of the motor mount, and the advanced mileage of 53,000 miles made the vehicle more sensitive to harmonic resonance vibration. (RT 529-30.) In essence, respondent had unreasonably used and maintained the vehicle, thereby causing the shuddering she felt.

Mr. Rolf Hanggi, service and parts consultant for BMW of North America, testified that the service history on the vehicle indicated it was not being maintained to normal standards.(RT 285.) Further, he testified that he observed the service indicator array was illuminated indicating the need for an oil inspection. (RT 286.)

Mr. William E. Butler, area manager for BMW of North America, also testified regarding insufficient maintenance on the subject vehicle. Specifically, he indicated that he was informed by BMW personnel that the vehicle's brakes had been used in such a way that they were overheated, causing the rotors to be blued, and that this had occurred on more than one occasion.(RT 353.) Further, he was told by his associates that the vehicle had not been in for any service or "maintenance-type" work. (RT 353.) Mr. Butler testified that he was asked to talk to respondent and explain to her that her use of the brakes was causing the rotor problem. (RT 353.)

Mr. Christopher J. Hearty, Service Manager for Roseville BMW, testified that he reviewed the service history on the subject vehicle. During one service, the tires were found to be out of balance, the rotors had hot spots caused from too much heat buildup, a caliper dust boot was torn and half gone, and a piston was scored. (RT 405, 406.) Even after making repairs, some minor shake was felt throughout the vehicle, which was attributable to the tires still being uneven. (RT 407.) Mr. Hearty also testified that in July 1989 the front brake rotors were found to be warped and in need of repair. (RT 409.) Mr. Hearty noted that certain driving conditions can enhance vibrations in the vehicle. (RT 409.)

Thus, it is clear that respondent failed to present substantial evidence to refute BMW's contention that her own unreasonable use of the vehicle caused a recurring brake problem. The evidence presented to the jury was insufficient for the jury to find BMW liable under Song-Beverly. There simply was not presented "such relevant evidence as a reasonable man might accept as adequate to support a conclusion.'" (Estate of Teed (1952) 112

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Cal.App.2d 638, 644.) Therefore, the verdict should be reversed.

V. AN AWARD OF A CIVIL PENALTY IN THE AMOUNT OF $58,702 IS INAPPROPRIATE SINCE THE STATUTE OF LIMITATIONS HAD RUN AND THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SUCH AN AWARD

A. RESPONDENT'S CLAIM FOR DOUBLE DAMAGES WAS TIME-BARRED

California Civil Code section 1794 provides, in pertinent part:

> (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.
>
> . . . .
>
> (c) If the buyer establishes that the failure to comply was wilful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages.

(Cal. Civ. § 1794 (emphasis added).)

In an action on a penalty or forfeiture, the statute of limitations is one year, unless a different limitation period is prescribed by the statute. (Cal. Code Civ. Proc. § 340(1).) Statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature. (Cole v. Sea Ray Boats, Inc. (1994) 26 Cal.App.4th 1, 9 (citing G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 277).) Moreover, the Cole court held that Civil Code section 1794 is a penalty governed by the one-year limitations period of Code of Civil Procedure section 340(1). (*Id.* at 13.)

In Cole, the respondent purchased a new boat manufactured by defendant Sea Ray Boats, Inc. (*Id.* at 5.) The boat was purchased on October 15, 1987 and Cole sent a letter to Sea Ray on October 15, 1988, but did not bring suit until January 5, 1990. (*Id.*) Respondent sought money damages and a civil penalty for breach of warranty pursuant to Civil Code section 1794. (*Id.*) On appeal, the Court of Appeal upheld the lower court's summary adjudication in favor of Sea Ray as to Cole's claim for double damages. (*Id.* at 17.) The court found that the legislature expressly described Civil Code section 1794(c) as a "civil penalty" and noted that:

> [S]ince subdivision (c) of section 1794, which provides for discretionary double damages, is separate from the actual damages provision of subdivision (a), the former is a penalty governed by the one-year limitations period of Code of Civil Procedure section 340, subdivision (1).

(*Id.* at 13 (emphasis added).)

To determine when a cause of action accrues under Song-Beverly, one applies the discovery rule of California Commercial Code section 2725(2). (Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal.App.3d 205, 218.)[17] An express warranty given by an automobile manufacturer is within the definition of a warranty which "explicitly extends to future performance of the goods." (Krieger, 234 Cal.App.3d at 217.) Therefore, discovery of a breach of Song-Beverly must await the time of such performance and a cause of action accrues when the breach is or should have been discovered.

Krieger involved interpretation of the statute of limitations for enforcement of Song-Beverly. (Krieger, 234 Cal.App.3d at 218.) Respondent had his automobile serviced by the defendant on five occasions. After the fifth service, he decided to take the vehicle to another dealership on the advice of the manufacturer. The court found that respondent's cause of action accrued when the respondent determined that defendant was unable to repair his car; the date he determined he would take the vehicle to a second dealership. Although Krieger determined the date on which a cause of action accrues for general damages, it is appropriate to apply the Krieger logic for purposes of determining when the one-year limitations period accrues for the civil penalty.

In the instant case, respondent's civil penalty is time-barred by the one-year limitations period. She testified that she called BMW at least twice and sent BMW a letter

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[17] California Commercial Code section 2725(2) provides:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(Cal. Com. Code § 2725(2).)

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in mid-1990. (RT 62-64.) Respondent clearly thought she had an ongoing problem with her vehicle since she felt compelled to call and write BMW of North America. Therefore, respondent had discovered, or should have discovered, any alleged breach of Song-Beverly as early as mid-1990. She testified that she informed BMW she would want "to exercise other options" if her brakes "were not repaired properly" at that time. (RT 64.) In October 1990, respondent explained to BMW's representatives that she was frustrated with attempts to repair her vehicle. (RT 68.) According to her testimony, she agreed to let BMW make repairs; it is also clear that she was hesitant about the potential effectiveness of such repairs. (RT 68.) Thus, it is clear that respondent had discovered any alleged defect in the vehicle no later than October 4, 1990. Suit was not filed until April 10, 1992; at least eighteen months after respondent discovered what she believes to have been a breach by BMW of the express warranty. Eighteen months is far in excess of the twelve month limitations period to seek a civil penalty. As such, respondent's demand for a civil penalty is time-barred.

B. RESPONDENT FAILED TO PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT A JURY FINDING THAT BMW WILFULLY VIOLATED SONG-BEVERLY; A CIVIL PENALTY IS INAPPROPRIATE

Under Song-Beverly, a buyer must establish that a manufacturer's failure to comply with the act was wilful in order to recover a civil penalty. (Cal. Civ. Code § 1794(c).) A violation of the Act is not wilful if the defendant's failure to replace or refund was a result of "a good faith and reasonable belief the facts imposing the statutory obligation were not present." (Kwan v. Mercedes-Benz of North America, Inc. (1994) 23 Cal.App.4th 174, 185.)

In Kwan, the Court of Appeal found that the jury was given inadequate instruction on the definition of "wilfulness" where the court only used the Penal Code definition.[18] After considering the intended scope of Civil Code section 1794(c), the court reached its definition of wilfulness. (*Id.* at 185.) The court then listed examples of what might be a good faith or reasonable belief in the legality of the defendant's actions:

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[18] The lower court in Kwan drew its instruction from Penal Code section 7(10). (Kwan, 23 Cal.App.4th at 185.)

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> 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.

(*Id.* (emphasis in original).) Therefore, in the instant case, respondent had the burden of demonstrating by substantial evidence that any violation of Song-Beverly by BMW was wilful; that is, that BMW did not have a good faith and reasonable belief the facts imposing the statutory obligation were not present. Respondent has failed to present even a scintilla of such evidence.[19]

Respondent stated that she believed her original braking problems were solved in July 1989. (RT 60-61.) She also admits that when the vehicle was returned for new brake problems in April 1990, BMW's representative told her it was not normal for a car to need rotor replacement so often. (RT 62.) This testimony corresponds with that of **Peter H. Kanae, Jr.** who testified that he tried to tell the respondent that her driving habits were responsible for her rotor problems. (RT 340-41.) Respondent testified that she was told by BMW's representatives that BMW was developing a new braking system due to problems with BMW brakes caused by some "parts being too soft or the wrong material or something." (RT 71.) On cross-examination, however, respondent admitted that she did not know if the "parts" being discussed were rotors or brake pads. (RT 142.) Further, although respondent testified that she informed BMW that she wanted replacement or reimbursement, this testimony is not relevant to whether BMW acted in good faith and with a reasonable belief they had an obligation under Song-Beverly. (RT 75, 76, 84, 169, 585.) (See, Kwan v. Mercedes-Benz of North America, Inc. 23 Cal.App.4th 174, 185.) Therefore, the fact that BMW would not discuss a refund with respondent is of no consequence in this matter. (RT 85.) BMW would be under no legal obligation to refund respondent's money or to replace her vehicle if Song-

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[19] As was discussed *supra*, a trial judge may be reversed where the appellate court finds that there was not substantial evidence in support of respondent's position. "Substantial" means "more than 'a mere scintilla'" and "such relevant evidence as a reasonable [person] might accept as adequate to support such a conclusion." (Estate of Teed (1952) 112 Cal.App.2d 638, 644.)

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Beverly did not apply.

It is clear that respondent has failed in her burden to produce substantial evidence establishing that BMW wilfully violated Song-Beverly. BMW's evidence, by comparison, overwhelmingly demonstrates that BMW believed this was a used vehicle which did not fall under Song-Beverly's new car provisions. BMW reasonably and in good faith believed they had no further obligations under Song-Beverly. Therefore, no civil penalty should have been imposed.

Mr. Rolf Hanggi, Service and Parts Consultant for BMW of North America, testified that BMW was capable of solving the problem with respondent's vehicle in October 1991 and that BMW offered to do just that. (RT 281, 284.) He believed that respondent had failed to properly maintain her vehicle. (RT 285-86.) BMW repaired respondent's brakes out of a desire to maintain her satisfaction as a customer. (RT 290.) Mr. Hanggi testified that, under these circumstances, he believed it was not a fair or reasonable request by respondent to demand replacement or reimbursement. (RT 312.)

Mr. Peter H. Kanae, Jr., general service manager for a Japanese car care center and formerly a service writer for Roseville BMW, testified that respondent's driving habits were responsible for the brake problems she was experiencing. (RT 339-40, 343.) (See, section IV.B; *supra.*)

Mr. William E. Butler, area manager for BMW of North America, testified that it would have been inappropriate for BMW to refund respondent's money or replace her vehicle. (RT 356-57.) He testified that the vehicle had a lot of miles on it and had no maintenance record, yet BMW was willing to repair the vehicle out of good will for a customer. (RT 357.) Further, Mr. Butler testified that all repairs which BMW had previously made on the vehicle had been performed properly. (RT 360.) He testified that he would not have hesitated to authorize a buy back or replacement if a situation warranted it. (RT 391, 397.)

Mr. Christopher J. Hearty, service manager for Roseville BMW, testified that there was no defect in the brakes of defendant's vehicle. (RT 434.) It was his belief that

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respondent created driving conditions that enhanced vibrations in the vehicle. (RT 409.) Mr. Hearty understood that BMW could compensate for these driving conditions by replacing the front hubs, all brake pads and all tires. (RT 424.) Mr. Hearty testified that other 1990-91 model 528e vehicles which had developed similar brake shimmy problems were also satisfactorily repaired by BMW. (RT 433-34, 436-37.) Further, he testified that he is aware of no evidence to indicate that the problems with respondent's vehicle were not adequately addressed each time. (RT 437.)

Mr. Peter S. Barron, Regional Technical Specialist for BMW of North America, testified that respondent's brake pads were not defective. (RT 483.) Mr. Barron based this opinion on his analysis of the service history and the mileage and time intervals between the brake pad replacements and the rotor replacements. (RT 558.) A service bulletin published by BMW for use by its employees regarding Jurid 506 brake pads did not indicate any defect or problem with the pads. (RT 521.) Instead, the bulletin addressed specific needs of North American BMW drivers and the superiority of the Jurid 506 brake pads for this purpose. (RT 521.) Further, Mr. Barron specifically testified that if he had been aware of a product defect with regard to respondent's vehicle, he would not have hesitated to report the problem to BMW's headquarters. (RT 539.) He testified that he felt a vibration when he drove the vehicle on two occasions, but that it was not in any way a "violent" feeling. (RT 504-05.) Moreover, Mr. Barron's testimony indicates that he thinks the repairs made to the vehicle by BMW were adequate in each instance. (RT 512, 524, 525, 531.) BMW was attempting to modify respondent's vehicle to compensate for her abusive manner of driving and for the lack of maintenance on the vehicle. (RT 516.)

Therefore the evidence presented by respondent was insubstantial to prove that BMW wilfully violated Song-Beverly. Reversal is appropriate.

VI. PLAINTIFF COUNSEL'S REPEATED USE OF THE TERM "LEMON LAW" VIOLATED THE IN LIMINE ORDER OF THE COURT AND PREJUDICED THE JURY

Motions *in limine* are commonly used "to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party." (People v. Morris (1991) 53 Cal.3d

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152, 188.) Such motions are advantageous in that they "avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." (*Id.*) Moreover, the California Supreme Court has held that motions *in limine* "can serve the function of a 'motion to exclude' under Evidence Code section 353 by allowing the trial court to rule on a specific objection to particular evidence." (*Id.*)[20] The Morris court held that:

> [A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. When such a motion is made and denied, the issue is preserved for appeal.

(Morris, 53 Cal.3d at 190.) Although the instant case does not involve a motion *in limine* which was denied, the rationale of the Morris decision is equally applicable here. The judge had already ruled that use of the term "lemon law" or "lemon" in describing the litigation or subject vehicle would be improper, inflammatory, and highly prejudicial to BMW's case under California Evidence Code section 352. (RT 3; CT 56-57, 114.)[21] Thereafter, respondent's

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[20] California Evidence Code section 353 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

(Cal. Evid. Code § 353.)

[21] The trial transcript does not contain a record of the actual *in limine* order of the court. The court did acknowledge on the record that it had "dealt with the reference to the lemon

counsel used the term on three occasions during his direct and cross examination of witnesses. (RT 305, 368, 545.) The respondent also used the term once on direct examination. (RT 84.) Finally, respondent's counsel said "lemon law" eleven times in his closing arguments. (RT 606, 607, 610, 611, 612, 619, 623, 624.)

Once respondent and respondent's counsel had violated the court's order and used the term "lemon law" the proverbial bell had been rung. The entire purpose for seeking the motion *in limine* restricting the use of this prejudicial term was frustrated. Objecting at that point in the trial would have been futile. The jury had already been tainted. Therefore, under the reasoning of Morris, BMW's motion *in limine* serves the purpose of a motion to exclude.

Further, the Morris factors were met in the present matter, sufficiently manifesting BMW's objection to the use of the terms "lemon law" or "lemon." First, a specific legal ground for exclusion was advanced by BMW and is now raised on appeal. BMW's motion *in limine* to exclude use of the terms "lemon law" and "lemon" was based on Evidence Code section 352. BMW wished to avoid use of terms which would be argumentative and inflammatory, would have a prejudicial impact on the jury, and would have no probative value. (CT 56-57.) In light of respondent's violation of the order, BMW now raises the issue of prejudice on appeal.

Second, the motion *in limine* was directed to a particular, identifiable body of evidence. Specifically, BMW wanted to exclude use of the terms "lemon law" and "lemon" from all aspects of the case. BMW requested an order ". . . admonishing plaintiff not to attempt to use such terms in any form, and not to suggest, comment directly or indirectly upon, or refer to such terms in any way before the jury. . . ." (RT 57.)

Third, the motion *in limine* was made at a time before trial when the trial judge could determine the evidentiary question in its appropriate context. BMW raised the motion before trial and explained their concern that if the terms were spoken in court the jury would

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law prior to selection of the jury." (RT 3.)

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be tainted such that BMW could not get a fair trial even if they were instructed to disregard it. (RT 56-57.) The trial judge granted the motion *in limine*, presumably upon the grounds that BMW would indeed be prejudiced if the terms were used. Thus, the court obviously thought that the evidentiary question could be determined appropriately at that point in the trial proceedings.

It is clear that BMW has met the three criteria advanced by the Morris court. BMW sufficiently manifested its objection so as to preserve the record for appeal. Since the violation of the judge's order prejudiced BMW's case before the jury, reversal is appropriate.

CONCLUSION

The numerous errors committed below resulted in BMW receiving an unfair trial. Most importantly, the lower court's misinterpretation of the Song-Beverly Consumer Warranty Act entitles BMW to judgment entered in its favor and reversal of the jury's verdict. In the alternative, this court should grant BMW a new trial.

DATED: October 11, 1994

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By _____
CLAUDIA J. ROBINSON

By _____
HENRY D. NANJO

Attorneys for Defendant, Appellant and Cross-Respondent BMW OF NORTH AMERICA INC.

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Reply MJN61

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Reply MJN62

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HENRY D. NANJO

October 7, 1994

Ms Alana Eichenhofer
Appeals Clerk
PLACER COUNTY SUPERIOR COURT
101 Maple Street, Room 401
Auburn, California 95603

Re: **Jensen v. Lucas, et al.**
Placer County No. : S2556
Court of Appeal No.: 3 Civil C018430

Dear Ms. Eichenhofer:

The purpose of this letter is to request that the Placer County Superior Court prepare a Supplemental Clerk's Transcript on Appeal to include: (1) minute order denying defendant's Motion for Judgment Notwithstanding the Verdict dated May 10, 1994; (2) order denying defendant's Motion for Judgment Notwithstanding the Verdict dated October 6, 1994, and done in open court on May 10, 1994. Both of these items were requested in defendant's original Notice Designating Reporter's and Clerk's Transcript on Appeal filed on June 2, 1994. However, they are not included in the Clerk's Transcript on Appeal.

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Thank you in advance for your prompt attention to this request.

Sincerely,

LEWIS, D'AMATO, BRISBOIS & BISGAARD

HENRY D. NANJO

HDN:qmg

cc: Mark F. Anderson, Esq.
Clerk, Third District Court of Appeal

C:\WP\WORK\JENSON\1-COURT.LTR

Reply MJN64

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Attorneys for Defendants DON LUCAS INTERNATIONAL, INC. dba STEVENS CREEK BMW/MOTORSPORT, a corporation, et al.

FILED

OCT 0 6 1994

CARL DePIETRO
CLERK OF THE SUPERIOR COURT
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

LISA A. JENSEN, Plaintiff, vs. DON LUCAS INTERNATIONAL INC., dba STEVENS CREEK BMW/MOTORSPORT, a corporation, et al., Defendants.	No. S-2256 ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

WHEREAS, judgment was entered for plaintiff Lisa A. Scott, formerly known as Lisa A. Jensen, against defendant BMW of North America, Inc. following the jury's verdict by minute order on March 23, 1994, and formal judgment entered on April 5, 1994;

WHEREAS, the judgment reserved jurisdiction of the Court to hear and decide a motion for judgment notwithstanding the verdict;

WHEREAS, defendants made a timely and properly noticed motion for judgment notwithstanding the verdict of the jury;

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WHEREAS, plaintiff opposed the motion and a hearing was conducted, and oral argument received, on May 10, 1994, in the chambers of the Honorable J. Richard Couzens, which was personally attended by Henry D. Manjo and James P. Mayo of the firm Lewis, D'Amato, Brisbois & Bisgaard, counsel for defendants, and by Mark F. Anderson, counsel for plaintiff, via telephone conference call;

WHEREAS, the Court has read and considered the parties' memoranda and accompanying declarations relating to the motion for judgment notwithstanding the verdict and has considered the oral arguments of counsel;

WHEREAS, the Court finds that defendants' motion for judgment notwithstanding the verdict is denied on the following grounds:

(1) There was sufficient evidence adduced at trial to support the jury's verdict because the provisions of the Song-Beverly Consumer Warranty Act (Civil Code § 1790, et seq.), and specifically the Tanner Consumer Protection Act (Civil Code § 1793.22), are interpreted to provide statutory coverage to plaintiff's used car leased subject to the balance of the manufacturer's limited express warranties;

(2) There was sufficient evidence adduced at trial confirming the existence of a defect which was not attributable to plaintiff's improper or unreasonable use of the vehicle and to support the jury's verdict and award of compensatory damages; and

/ / /

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(3) There was sufficient evidence adduced at trial to establish defendants' wilful conduct, lack of good faith, and/or unreasonable belief that the facts imposing an obligation to either reimburse or replace plaintiff's vehicle were not present, and to support the jury's verdict and award of a civil penalty. Specifically, defendants' "trade-assistance" proposal to plaintiff to get her into a new BMW after transferring the residual balance of her present lease into the lease price of the new vehicle, thereby making the cost of the new vehicle twice its normal retail price, demonstrated sufficient evidence of wilfulness and lack of good faith;

IT IS HEREBY ORDERED, based on the foregoing, that defendants' motion for judgment notwithstanding the verdict is denied.

Plaintiff's motion to strike the declaration of Henry D. Manjo filed in connection with defendants' motion for judgment notwithstanding the verdict is denied.

Dated: May ___, 1994.

JUDGE OF THE SUPERIOR COURT

Approved as to form:

Mark F. Anderson
Kamnitzer, Dickinson, Anderson & Barron
Attorneys for Plaintiff

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(3) There was sufficient evidence adduced at trial to establish defendants' wilful conduct, lack of good faith, and/or unreasonable belief that the facts imposing an obligation to either reimburse or replace plaintiff's vehicle were not present, and to support the jury's verdict and award of a civil penalty. Specifically, defendants' "trade-assistance" proposal to plaintiff to get her into a new BMW after transferring the residual balance of her present lease into the lease price of the new vehicle, thereby making the cost of the new vehicle twice its normal retail price, demonstrated sufficient evidence of wilfulness and lack of good faith;

IT IS HEREBY ORDERED, based on the foregoing, that defendants' motion for judgment notwithstanding the verdict is denied.

Plaintiff's motion to strike the declaration of Henry O. Wanjo filed in connection with defendants' motion for judgment notwithstanding the verdict is denied.

DONE IN OPEN COURT:
DATED: May 10, 1994.

SIGNED: 10/6/94

JUDGE OF THE SUPERIOR COURT

Approved as to form:

Mark E. Anderson
Kennitzer, Dickinson, Anderson & Barron
Attorneys for Plaintiff

Reply MJN69

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Assembly
California Legislature

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ASSEMBLYWOMAN SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

COMMITTEES
AGING AND LONG TERM CARE
ENVIRONMENTAL SAFETY & TOXIC MATERIALS
GOVERNMENTAL ORGANIZATION
LABOR & EMPLOYMENT
SUBCOMMITTEES
HAZARDOUS WASTE DISPOSAL ALTERNATIVES
SPORTS & ENTERTAINMENT
TOXIC DISASTER PREPAREDNESS
MEMBER
JOINT COMMITTEE ON FIRE POLICE EMERGENCY AND DISASTER SERVICES
GOVERNOR'S TASK FORCE ON TOXICS WASTE & TECHNOLOGY
SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE

September 14, 1987

Honorable George Deukmejian
Governor, State of California
State Capitol
Sacramento, California 95814

Dear Governor Deukmejian:

Assembly Bill 2057 is now before you for your consideration. I introduced the measure to address two problems that arose during the implementation of the original California "Lemon Law" which I authored in 1982.

First, the original legislation did not give adequate direction on the refunds that consumers should be given when they are sold automobiles so defective that they cannot be repaired after a reasonable number of attempts. Because of this, owners of "lemons" now do not receive a refund on sales tax and the unused portion of license and vehicle registration fees -- an amount that is often in excess of $1,000 or more -- when an auto manufacturer buys back a defective product. AB 2057 establishes a reasonable method for fairly compensating "lemon" car owners.

Second, California's original "Lemon Law" allowed for the use of arbitration programs sponsored by auto manufacturers to settle "lemon" cases, but did not establish a means of ensuring that these programs were operated fairly and impartially. Because of this, even though most auto manufacturers offer such arbitration programs, many consumers do not view them as an impartial means of settling easily and fairly disputes concerning defective vehicles. AB 2057 establishes a program in the Bureau of Automotive Repair to certify that arbitration programs are operated in accordance with principles that protect the rights of both the auto manufacturer and the consumer.

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AB 2057, in its enrolled version, has no known opposition. The measure is supported by Chrysler Corporation, the Attorney General, the California Public Interest Research Group, Consumers Union and Motor Voters. General Motors Corporation, Ford Motor Company, American Honda Motor Company and the Automobile Importers of America are all neutral on the bill. The support or neutrality of the auto manufacturers was achieved after amendments were made to the bill in the Senate Judiciary Committee.

Assembly Bill 2057, as it is before you, is a measure that updates consumer law in light of the past four years of experience in implementing the original California "Lemon Law". It accomplishes this by carefully balancing the rights of consumers against the rights and responsibilities of auto manufacturers. The bill is a moderate measure that moves this area of consumer law forward in a reasonable, but significant, manner.

I urge you to sign it into law.

Sincerely,

SALLY TANNER
Assemblywoman, 60th District

ST:acf

Reply MJN71

ENROLLED BILL REPORT

Analyst: Gale Baker
Bus. Ph: 323-0399
Home Ph:

AGENCY: STATE AND CONSUMER SERVICES AGENCY	BILL NUMBER: AB 2057
DEPARTMENT, BOARD OR COMMISSION: CONSUMER AFFAIRS	AUTHOR: Tanner

SUMMARY
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BILL SUMMARY

This bill would revise the new car lemon law and would require the Department of Consumer Affairs' Bureau of Automotive Repair to certify third party dispute resolution processes used for resolution of lemon law disputes. The Certification Program would be fully funded by fees paid by manufacturers and distributors based on the number of vehicles sold in California.

Background

Under the new car lemon law (Chapter 388, Statutes of 1982), a manufacturer who is unable to service or repair a new motor vehicle with a major defect after a reasonable number of attempts must either replace the vehicle or reimburse the buyer. A "reasonable number of attempts" is either four or more repair attempts on the same major defect or more than 30 days out of service within the first year or 12,000 miles of use. A new motor vehicle which meets this test is presumed to be a "lemon."

The buyer of a "lemon" may bring an action to enforce his or her rights under the lemon law. However, if the manufacturer has a qualified third party dispute resolution process (arbitration program) as defined in the lemon law, the buyer must first attempt to resolve the dispute by submitting it to the arbitration panel.

VOTE:	Assembly	Partisan R D		Senate	Partisan R D
Floor:	54-20	(concurrence	Floor:	39-0	
Policy Committee:	6-1	56-22)	Policy Committee:	9-0	
Fiscal Committee:	18-5		Fiscal Committee:	9-0	

RECOMMENDATION TO GOVERNOR: SIGN X with memo VETO ____ NO POSITION ____ DEFER TO OTHER AGENCY ____

DEPARTMENT DIRECTOR:	DATE: 7/22/87	AGENCY SECRETARY:	DATE: 9-25-87

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If the manufacturer does not have an arbitration program, if the manufacturer fails to give timely notice to the buyer of the existence of the arbitration program, if the buyer is dissatisfied with the panel's decision, or if the manufacturer fails to promptly fulfill the terms of the arbitration decision, the buyer may sue for replacement or restitution.

Since the passage of the lemon law in 1982, consumers and consumer groups have complained that there are a number of ambiguities in the law and that the arbitration programs often are not meeting the requirements for qualification or rendering decisions which confer the rights and remedies in the lemon law. They complain that arbitration programs are ineffectual and/or render decisions which are biased toward the manufacturer.

In the 1985-86 Session, Assemblywoman Tanner, who authored the original lemon law, introduced AB 3611 as a clean-up measure to the lemon law to respond to these grievances. The bill was initially opposed by manufacturers, but the final amended version, which was substantially similar to this bill, was unopposed. AB 3611 failed in the Senate Appropriations Committee for reasons unrelated to the substance of the bill.

The Department of Consumer Affairs worked closely with Assemblywoman Tanner in drafting the original lemon law and since its enactment has been very involved in monitoring its impact. The department publishes a widely-distributed consumer information pamphlet ("Lemon Aid for New Car Buyers") and advises consumers with lemon law complaints. In 1985 the department conducted a comprehensive study of the impact and effectiveness of the lemon law. In its New Car Lemon Law Report and Questionnaire (September 1985), the department noted a number of ambiguities in the law and problems with the arbitration programs, and identified possible legislative responses to these concerns. A number of the department's suggestions were incorporated into AB 3611 and this bill.

For instance, the lemon law does not state whether it is the manufacturer or the buyer who is entitled to decide between a replacement or restitution. Manufacturers would prefer to replace a vehicle rather than make restitution, but a consumer frustrated with having been stuck with a "lemon" understandably may prefer restitution.

The present law also does not specify what costs are included when awarding restitution or replacement. Restitution or replacement awards under current practice often do not make the buyer "whole" (i.e., compensate him or her for expenses such as sales tax, license and registration fees, and towing or rental car costs).

The calculation of the offset for the buyer's use prior to discovering the defect is a major source of disagreement between

buyers and manufacturers. A frequent complaint is that manufacturers seek reimbursement equal to the offset for use of commercial rental cars, which would be excessive and unfair to the buyer.

Some buyers are being denied the remedies under the lemon law because their vehicle is a "demonstrator" or "dealer-owned" car, even though it was sold with a new car warranty.

The major grievance is that arbitration programs do not comply with the Federal Trade Commission's Rule 703, which sets forth minimum requirements for arbitration programs, or other requirements of the lemon law. Consumer groups complain that the FTC has failed to enforce Rule 703. FTC staff, however, state that the FTC does not have the authority to enforce Rule 703 unless a manufacturer has violated the federal Magnuson-Moss Consumer Warranty Act. (The Magnuson-Moss Act permits manufacturers to establish arbitration programs to resolve warranty disputes. If a manufacturer opts to use an arbitration program, the program must comply with the standards in Rule 703. The FTC states that a manufacturer who fails to comply with Rule 703 is not subject to FTC enforcement action unless the manufacturer also has violated the Magnuson-Moss Act.)

Specific Findings

AB 2057 would establish a state program for certifying third-party dispute resolution processes, specify requirements for certification, and allow courts to award treble damages to buyers of lemon cars under limited circumstances.

A. Certification

AB 2057 would require third party dispute resolution programs used for arbitration of lemon law cases to be certified by the Bureau of Automotive Repair (BAR). The BAR would be required to review the application for certification and conduct an onsite inspection to determine whether the program is in "substantial compliance" with the terms of this bill. If the program is not in substantial compliance, the BAR would deny certification and state in writing the reasons for the denial and the modifications necessary to obtain certification. The BAR would be required to make a final determination whether to certify a program within 90 days after receiving the application.

The BAR would be required to review the operations and performance of arbitration programs annually to determine whether the programs continue to be in substantial compliance with the certification standards. If a program is no longer in substantial compliance, the BAR would be required to issue a notice of decertification, stating the reasons for the proposed decertification and prescribing the modifications necessary to retain certification. The decertification would take effect 180 days after the notice is served, unless the BAR determines, after

a public hearing, that the modifications necessary to bring the program into compliance have been made.

The BAR would be required to make at least two onsite inspections per year, investigate complaints from consumers regarding arbitration programs, and analyze representative complaints against each arbitration program. The BAR would be required to establish methods to measure customer satisfaction and identify violations of this bill, including an annual random survey of customers of the programs and analysis of the results.

The BAR also would be required to submit a biennial report to the Legislature evaluating the effectiveness of this bill; make available to the public summaries of the statistics and other information supplied by arbitration programs; and publish educational materials regarding the purposes of this bill.

The New Motor Vehicle Board (NMVB) would administer the collection of fees, to be paid by manufacturers and distributors, to fully fund the certification program. The BAR would be required to determine the amount necessary to fund its responsibilities under this bill and report that amount annually to the NMVB.

Manufacturers and distributors would be assessed a fee, not to exceed $1 per vehicle sold, leased or distributed in California during the previous calendar year, to be paid to the DMV to fund the certification program. Fees would be deposited into a newly-created certification account in the Automotive Repair Fund and would be available to the BAR upon appropriation by the Legislature.

B. Lemon Law Clean-Up Changes

Replacement/Restitution. The bill would give the buyer the option to elect restitution instead of replacement of a "lemon." The manufacturer would be required to reimburse sales or use tax, license and registration fees and incidental damages such as reasonable repair, towing or rental car costs incurred by the buyer. The manufacturer would be reimbursed by the Board of Equalization for the sales tax (but not by the DMV for the license and registration fees).

The replacement cost or restitution may be offset by the buyer's use before the buyer delivered the vehicle to the manufacturer for correction of the defect. The amount attributed to the buyer's use would be determined by dividing the number of miles travelled prior to the time the buyer first delivered the vehicle to the manufacturer by 120,000, multiplied by the price of the car. (According to the state Department of Transportation, 120,000 miles is the average life expectancy of an automobile ("The Cost of Owning and Operating an Automobile or Van," 1984).)

Disciplinary Action. If a manufacturer fails to honor a decision of the arbitration panel, the BAR would be required to notify the Department of Motor Vehicles (DMV) for appropriate enforcement action. Under current law, the DMV has the authority to suspend or revoke the license of a dealer, manufacturer or distributor who has willfully violated the terms and conditions of any warranty responsibilities under the Consumer Warranty Act, which contains the New Car Lemon Law.

"Demonstrator" Vehicles. The bill includes within the protection of the lemon law dealer-owned vehicles and "demonstrator" vehicles sold with a manufacturer's new car warranty.

Resale of a "Lemon". The manufacturer may not re-sell or re-lease a "lemon" unless the defect has been corrected and is disclosed to the new buyer or lessee, and the manufacturer warrants that the vehicle will be free of that defect for one year. (This provision applies only to vehicles which are bought back by the manufacturer as "lemons" pursuant to the Lemon Law not those which are transferred back to the manufacturer for an other reason).

Assertion of "Lemon Presumption". The vehicle buyer may assert the "lemon presumption" in any civil action, including small claims court, or any other formal or informal proceeding.

Qualified Arbitration Program. The bill amends the definition of what constitutes a "qualified" third party dispute resolution process for lemon law disputes. Current law defines a "qualified third party dispute resolution process" as one which complies with the FTC requirements for informal dispute resolution procedures contained in the Commission's Rule 703; that renders decisions which are binding on the manufacturer if the buyer elects to accept the decision; that prescribes a reasonable time, not to exceed 30 days, within which the manufacturer must fulfill the terms of those decisions; and that annually provides to the DMV a report of its audit required by the Commission's Rule 703.

This bill would require dispute resolution programs to comply with the FTC's Rule 703 as those regulations read on January 1, 1987 and delete the requirement that manufacturers provide to the DMV a report of their audit (which none of them have done anyway). In addition, this bill would:

- Require arbitrators to be instructed in and have copies of rules governing lemon law arbitration decisions (i.e., the FTC's Rule 703, Commercial Code provisions concerning the computation of damages, and the lemon law itself).

- Require arbitration panels to "take into account" specified federal and state remedies in lemon law cases, and authorize arbitration panels to order any other equitable remedy appropriate under the circumstances of the case.

- Require the manufacturer to comply with an arbitration order for replacement or reimbursement.

- Provide, at the request of the arbitrator or a majority of the arbitration panel, an independent inspection of the vehicle at no cost to the buyer.

- Prohibit arbitrators deciding a dispute from being a party to the dispute, and prohibit anyone else (including an employee, agent or dealer for the manufacturer) from participating substantively in the merits of the dispute unless the buyer is allowed to participate also.

Treble Damages. This bill would authorize the court in a lemon law case to award treble damages to a "lemon" buyer if the manufacturer fails to rebut the "lemon presumption" and the manufacturer does not maintain an arbitration program which is in substantial compliance with the lemon law certification standards.

Complaint Mediation. Existing law gives the NMVB the authority to "arbitrate amicably or resolve" any honest difference of opinion or viewpoint between any member of the public and any new motor vehicle dealer or manufacturer. This bill would specifically give the NMVB the authority to mediate any such difference of opinion, including, by inference, a lemon law complaint.

In addition, the latest amendments to this bill incorporate the substance of AB 1367 (Tanner), which also would amend the New Car Lemon Law (the Department of Consumer Affairs prepared an enrolled bill report recommending signature of AB 1367 but the bill has since been placed on the inactive file), and is double-joined with AB 276 (Eaves) which, like AB 2057, amends the Revenue and Taxation Code.

The bill also appropriates $25,334 to the Department of Motor Vehicles to computerize its billing system for collecting motor vehicles fees from automobile manufacturers under this bill. The appropriation is from the unappropriated surplus of the New Motor Vehicle Board Account in the Motor Vehicle Account. The New Motor Vehicle Board is not opposed to the appropriation as it will be repaid in the next fiscal year from fee revenues that will be collected beginning July 1, 1988. The DMV had requested this appropriation.

Fiscal Impact

This bill calls for a new state program, to be administered by the Bureau of Automotive Repair, and fully funded by fees paid by manufacturers and distributors when they renew their licenses.

A fiscal analysis is attached. The analysis projects expenditures of $281,000 for Fiscal Year 1988-89 and thereafter and revenue of $300,000 based on a $.13-.16 assessment per vehicle sold, leased or distributed in the state. Four PYs (a Program Representative II, two Program Representatives I and one Office Technician (Typing) are projected).

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Argument

Interested Parties

Proponents:	Author (sponsor) Cal-PIRG Chrysler Motors Consumers Union
Neutral:	Automobile Importers of America Department of Motor Vehicles Ford Motor Company General Motors New Motor Vehicle Board State Board of Equalization
Opponents:	None known

Proponents argue that AB 2057 addresses various problems in the new car lemon law, enacted five years ago. For instance, under the lemon law, owners of "lemons" are required to use a "qualified" arbitration process before they may resort to the courts. However, the arbitration programs are either operated or sponsored by the manufacturers and they have not provided a fair and impartial process for consumers. In some cases, these panels have failed to maintain "qualified" programs and abide by provisions of the lemon law and the Federal Trade Commission's arbitration regulations. The panels often rely on experts supplied by manufacturers. Finally, while the panels frequently require one more repair attempt, they do not follow up to ensure that the vehicle has been satisfactorily repaired.

In addition, costs such as sales taxes, license and registration fees, and towing and rental car costs are not reimbursed, and the amount the manufacturer may deduct for the use of the vehicle from the replacement value is not specified and often results in deductions which are calculated to the advantage of the manufacturer and the detriment of the consumer.

Proponents argue that AB 2057 would help ensure that consumers get a fair and impartial hearing in the arbitration process. In sum, proponents argue that the bill contains the needed provisions to assure consumers stuck with "lemons" receive the compensation, rights and remedies to which they are entitled.

There is no known opposition to the bill in its present form, although some attorneys who represent consumers in lemon law cases have expressed concern with amendments which were negotiated with the automobile manufacturers to remove their opposition (such as an amendment which allows manufacturers to maintain certification if they are in "substantial" compliance with certification standards). However, while the department is sympathetic to their concerns, we note that the bill would not

have passed without the amendments and do not agree that the amendments will reduce existing protections.

The Bureau of Automotive Repair supports the concept of the portion of the bill giving it certification and decertification powers but has expressed concern that its power to decertify does not constitute enough of a "hold" on a potentially recalcitrant manufacturer. It would seem, however, that a threat to institute decertification proceedings, if communicated honestly and with valid reasons, ought to be enough to induce the manufacturer to make any needed changes. In addition, the DMV would be empowered to suspend or revoke the license of a manufacturer who repeatedly fails to honor the decision of an arbitration panel.

The Department of Consumer Affairs has recommended (but not received) a "support" position on this bill.

Recommendation

The Department of Consumer Affairs recommends that this bill be SIGNED.

At present, there is no way for a buyer to determine whether an automobile manufacturer's arbitration program complies with the present legal requirements contained in FTC Rule 703 and the California lemon law. By providing for certification by a state agency, buyers will be reasonably assured that an arbitration panel is operating in compliance with the law. In addition, the bill provides a number of necessary clarifying and fine-tuning amendments to the lemon law.

NOTE: The concurrence vote on AB 2057 (September 10, 1987) was 56-22. Twelve Republicans voted for concurrence and all other Republicans voted against it. The Republican concurrence analysis recommended a "no" vote. The department believes that the caucus analysis (copy attached) presents only one side of the issue, and we would like to respond to the concerns raised therein.

First of all, the analysis does not acknowledge the serious problems with the current arbitration programs. As stated earlier under Background, the department conducted an extensive investigation of lemon law arbitration programs and found a number of problems with the way they are run. We believe that these problems need attention; consumer complaints to this department and other consumer protection agencies indicate a high level of dissatisfaction and a lack of faith in the present programs.

The lemon law gives consumers and manufacturers an alternative to court action to resolve lemon law problems. This is designed as much for the benefit of the manufacturer as the consumer; however, the analysis implies that this is to the consumer's and not the manufacturer's advantage. However, the lemon law provides - at the insistence of the manufacturers in negotiations on the original lemon law - that if the manufacturer

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has an arbitration program (and virtually all of them do), a consumer must submit the complaint to the arbitration panel prior to attempting to assert his or her rights in court.

Currently, these programs are not "overseen" by anyone. Their decisions are often biased in favor of the manufacturer. The arbitrators may not be trained in the rights and remedies of the lemon law (for instance, the Better Business Bureau, which handles lemon law cases for General Motors and most of the importers, has stated publicly that they purposely do not train their arbitrators in the lemon law), and their decisions often do not confer the rights and remedies in the lemon law. This practically negates the effectiveness of the lemon law and leaves the consumer with the unhappy choice of pursuing legal action (which few want or can afford) or with no recourse (i.e., taking a loss on the car).

Second, the analysis states that new car buyers will have to pay for the certification. While this is true (the manufacturers actually have to pay the assessment but it will probably be passed on to the consumer by way of a higher sticker price), the bill limits the amount assessed to not more than $1.00 per vehicle. We believe this is an insignificant cost to help ensure that consumers will have fair recourse if the car they purchase turns out to be a lemon. In addition, the department's fiscal analysis indicates that a much lower fee ($.13 - $.16 per vehicle) will be adequate to fund the program (and in fact may result in a surplus which would be carried over to the next year).

Third, we disagree that the bill will create a bureaucracy. The Bureau of Automotive Repair's functions are limited under the bill, and ongoing certification functions would not require a great increase in PYs (our fiscal analysis indicates that four PYs will be needed to run the certification program)

Fourth, as to the treble damages provision, that provision has been significantly amended and the manufacturers are no longer opposed to it. The analysis states that the "triple (sic) damage provision is onerous." However, the manufacturers would not sign off on an onerous provision. The provision is very limited now. Recent amendments reduced the standard of compliance with certification standards to "substantial" compliance and made an award of treble damages discretionary with the court. Only in the most abusive circumstances by a manufacturer is that provision likely to be enforced, and only by those few consumers who have the financial capability to bring an action.

Fifth, we also question why this bill would create more legal costs for manufacturers. In keeping with the intent of the original lemon law, this bill is designed to reinforce viable alternatives that consumers and manufacturers can use to resolve complaints outside the court system. If anything, this bill is designed to decrease the possibility of court action by a dissatisfied consumer because it would improve the arbitration process.

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The fact is that very few consumers have the capacity or desire to be involved in legal action with a manufacturer. Also, there are very few consumer attorneys who are willing or able to represent consumers in lemon law cases. Legal recourse is an undesirable option for a consumer because the costs, frustration, delays and legal action are much more of a burden on the consumer than on the manufacturer.

Last, the reason the automobile manufacturers do not oppose the bill now is that the bill has been moderated to such an extent that they now consider it to be a reasonable approach (and far less onerous than the kinds of legislation they are confronting in several other states). In addition, it would be viewed as unresponsive to serious and prevalent complaints about defective new cars if they continued to oppose the bill after all of the concessions have been made.

In summary, the evidence is that the programs are not working according to the requirements in the law and there is no viable method to ascertain whether the programs meet certain required standards. Having poor quality programs that do not meet the standards bears heavily on a consumer who may be making payments on a new car, meanwhile not being able to use the car and having no alternate mode of transportation other than a rental car. One of the purposes of certification is to assure consumers that these programs meet the standards. These are programs which the law requires consumers to use prior to asserting their rights by private legal action. We therefore feel that consumers are entitled to assurance that the programs themselves are being conducted in conformance with the law.

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Connecticut

GENERAL STATUTES ANNOTATED

Under Arrangement of the Official
General Statutes of Connecticut
Revision of 1958

Volume 18

Titles

38a. Insurance
§§ 38a–595 to 38a–End
39. Negotiable Instruments
40. Warehouses and Warehouse Receipts, Trust Receipts
41. Bills of Lading
42. Business, Selling, Trading, and Collection Practices

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CHAPTER 743f

USED AUTOMOBILE WARRANTIES

Section

Cross References

Automobile manufacturers' warranty adjustment programs, see § 42–227.
New automobile warranties, see § 42–179 et seq.

§ 42–220. Definitions

As used in sections 42–220 to 42–226, inclusive:

(1) "Dealer" means any person, firm or corporation licensed pursuant to section 14–52, as a new car dealer or a used car dealer, as defined in section 14–51;

(2) "Motor vehicle" means a motor vehicle, as defined in subdivision (30) of section 14–1;

(3) "Used motor vehicle" means a used or secondhand motor vehicle, as defined in subdivision (62) of section 14–1;

(4) "Cash purchase price" means all amounts charged for the purchase of a motor vehicle, including the value of a trade-in vehicle, except a finance charge; and

(5) "Consumer" means the purchaser, other than for purposes of resale, of a used motor vehicle normally used for personal, family or household purposes, and the spouse or child of the purchaser if such motor vehicle is transferred to the spouse or child during the duration of any warranty

applicable to such motor vehicle, and any other person entitled by the terms of such warranty to enforce the obligations of the warranty. "Consumer" does not mean the lessee of a motor vehicle who, pursuant to a lease contract option, purchases such vehicle at the end of the lease term.

(1987, P.A. 87–393, § 1, eff. Oct. 1, 1987; 1992, P.A. 92–20, § 1, eff. April 29, 1992.)

Historical and Statutory Notes

Amendments

1992 Amendment. 1992, P.A. 92–20, § 1, in subsec. (5), excluded from the definition of "consumer" the lessee of a motor vehicle who, pursuant to a lease contract option, purchases such vehicle at the end of the lease term.

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

Words and Phrases

Words and Phrases (Perm.Ed.)

§ 42–221. Implied warranties. Express warranties. Exemptions. Waiver

(a) A dealer selling a used motor vehicle which has a cash purchase price of three thousand dollars or more shall not exclude, modify, disclaim or limit implied warranties on the motor vehicle.

(b) Each contract entered into by a dealer for the sale to a consumer of a used motor vehicle which has a cash purchase price of three thousand dollars or more but less than five thousand dollars, shall include an express warranty, covering the full cost of both parts and labor, that the vehicle is mechanically operational and sound and will remain so for at least thirty days or one thousand five hundred miles of operation, whichever period ends first, in the absence of damage resulting from an automobile accident or from misuse of the vehicle by the consumer. Each contract entered into by a dealer for the sale of a used motor vehicle which has a cash purchase price of five thousand dollars or more shall include an express warranty, covering the full cost of both parts and labor, that the vehicle is mechanically operational and sound and will remain so for at least sixty days or three thousand miles of operation, whichever period ends first, in the absence of damage resulting

from an automobile accident or from misuse of the vehicle by the consumer. A dealer may not limit a warranty covered by this section by the use of such phrases as "fifty-fifty", "labor only", "drive train only", or other words attempting to disclaim his responsibility.

(c) The provisions of this section shall not apply to: (1) The sale of a used motor vehicle having a cash purchase price of less than three thousand dollars; (2) the sale of such motor vehicles between dealers; or (3) the sale of a used motor vehicle which is seven years of age or older, which age shall be calculated from the first day in January of the designated model year of such vehicle.

(d) The consumer may waive a warranty required pursuant to this section only as to a particular defect in the vehicle which the dealer has disclosed to the consumer as being defective. No such waiver shall be effective unless such waiver: (1) Is in writing; (2) is conspicuous, as defined in subdivision (10) of section 42a–1–201 and is in plain language; (3) identifies the particular disclosed defect in the vehicle for which such warranty is to be waived; (4) states what warranty, if any, shall apply to such disclosed defect; and (5) is signed by both the customer and the dealer prior to sale.

(1987, P.A. 87–393, § 2, eff. Oct. 1, 1987.)

Cross References

Plain language standards, see § 42–152.

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

§ 42–222. Effect of notification of breech of warranty during warranty period

A dealer shall honor any warranty required by sections 42–220 to 42–226, inclusive, notwithstanding the fact that the warranty period has expired, provided the consumer notifies the dealer of a claimed breach of the warranty within the warranty period specified in subsection (b) of section 42–221.

(1987, P.A. 87–393, § 3, eff. Oct. 1, 1987.)

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

§ 42–223. Extensions of warranty period. Voidable agreements

(a) The term of any warranty required under the provisions of sections 42–220 to 42–226, inclusive, shall be extended by any time period during which the used motor vehicle is in the possession of the dealer or his duly authorized agent for the purpose of repairing the used motor vehicle under the terms and obligations of said warranty.

(b) The term of any such warranty shall be extended by any time during which repair services are not available to the consumer because of a war, invasion or strike, fire, flood or other natural disaster.

(c) Any agreement entered into by a consumer for the purchase of a used motor vehicle which waives, limits or disclaims the rights set forth in sections 42–220 to 42–226, inclusive, except as provided in subsection (d) of section 42–221, shall be voidable at the option of the consumer. If a dealer fails to provide a written warranty as required by said sections, the dealer shall be deemed to have given said warranty.

(d) Nothing in sections 42–220 to 42–226, inclusive, shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

(1987, P.A. 87–393, § 4, eff. Oct. 1, 1987.)

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

§ 42–224. "As is" sales. Disclaimer

(a) A used motor vehicle may be sold "as is" by a dealer only if its cash purchase price is less than three thousand dollars or if such used motor vehicle is seven years of age or older, which age shall be calculated from the first day in January of the designated model year of such vehicle.

(b) No "as is" disclaimer by a dealer shall be enforceable unless all of the following conditions are met:

(1) A disclaimer shall appear on the front page of the contract of sale, which shall read as follows:

"AS IS"
THIS VEHICLE IS SOLD "AS IS". THIS MEANS
THAT YOU WILL LOSE YOUR IMPLIED WARRANTIES.
YOU WILL HAVE TO PAY FOR ANY REPAIRS
NEEDED AFTER SALE.
IF WE HAVE MADE ANY PROMISES TO YOU, THE
LAW SAYS WE MUST KEEP THEM, EVEN IF WE
SELL "AS IS". TO PROTECT YOURSELF, ASK US
TO PUT ALL PROMISES INTO WRITING.

(2) The text of the disclaimer shall be printed in twelve-point boldface type, except the heading shall be in sixteen-point extra boldface type. The entire notice shall be boxed.

(3) The consumer shall indicate his assent to the disclaimer by signing his name within the box containing the disclaimer.

(c) An "as is" sale of a used motor vehicle waives implied warranties but shall not waive any express warranties, whether oral or written, which may have been made nor shall it affect the dealer's responsibility for any representations which may have been made, whether oral or written, upon which the buyer relied in entering into the transaction.

(d) Nothing in sections 42–220 to 42–226, inclusive, shall be construed to limit the effect of any other requirements of law or of any representations on a certificate of title that the vehicle is in suitable condition for legal operation on the highways of this state.

(1987, P.A. 87–393, § 5, eff. Oct. 1, 1987.)

Cross References

Exclusion or modification of warranties, see § 42a–2–316.

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

§ 42–225. Deceptive statements. Promise to repair

(a) No dealer may make any false, misleading or deceptive statements about the condition or history of any used motor vehicle offered for sale.

(b) If a dealer promises that any repairs will be made or any conditions corrected in connection with the purchase of a used motor vehicle, he shall list such repairs in writing, attach a copy of such list to the contract and incorporate such list into the contract.

(1987, P.A. 87–393, § 6, eff. Oct. 1, 1987.)

Library References

American Digest System

Consumer protection; motor vehicles sales, service, and rental, see Consumer Protection ⇐9.

Making and requisites of express warranty in general, see Sales ⇐260.

Encyclopedias

Consumer protection; sale or lease of motor vehicles, see C.J.S. Credit Reporting Agencies; Consumer Protection § 52.

Creation and existence of express warranties in general, see C.J.S. Sales § 307 et seq.

WESTLAW Research

Consumer protection cases: 92hk[add key number].
Sales cases: 343k[add key number].

§ 42–226. Independent inspection

No dealer may refuse any consumer the opportunity to have an independent inspection of any used motor vehicle offered for sale. If the consumer requests an inspection it shall be conducted by a person chosen by the consumer, but the dealer may establish reasonable conditions regarding the place, time and extent of the inspection.

(1987, P.A. 87–393, § 7, eff. Oct. 1, 1987.)

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is 2720 Gateway Oaks Drive, Suite 250, Sacramento, California 95833-3501.

On this date, I served the foregoing document, described as APPELLANTS' OPENING BRIEF addressed as follows:

CALIFORNIA COURT OF APPEAL (Original and 4 copies)
THIRD APPELLATE DISTRICT
914 Capital Mall, Room 119
Sacramento, California 95814

CALIFORNIA SUPREME COURT (Five copies)
Library and Courts Building
Sacramento, California 95815

PLACER COUNTY SUPERIOR COURT (Case No. S-2256)
101 Maple Street
Auburn, California 95603

Mark Anderson
KEMNITZER, DICKINSON, ANDERSON & BARRON
386 Hayes Street
San Francisco, California 94102

David Cordero
BMW of North America, Legal Department
Post Office Box 1227
Woodcliff Lake, New Jersey 07675

X (BY MAIL) I am familiar with the business practice of Lewis, D'Amato, Brisbois & Bisgaard with regard to collection and processing of correspondence for mailing with the United States Postal Service. The correspondence described above was sealed and placed for collection and mailing on the date stated below. Pursuant to said business practices correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on October 11, 1994 at Sacramento, California.

Genevieve E. O'Keefe

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s & Bisgaard
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Reply MJN91

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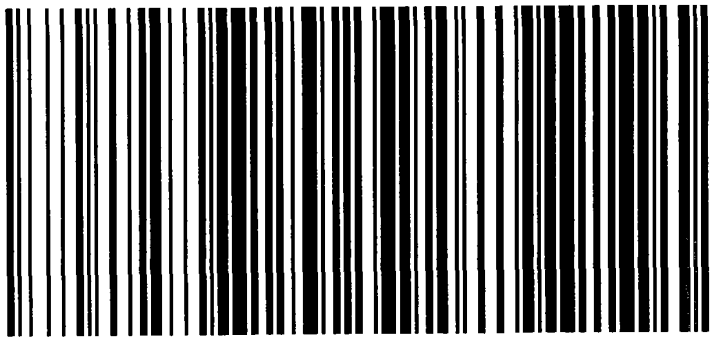

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Code 128

Docket #C018430

Brief Type: Appellant's Reply

Box #: 3405

Entered 5/28/2014 9:43:33 AM by rquinesares

Reply MJN92

3 Civil C018430

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

LISA A. JENSEN

Plaintiff, Respondent and Cross-Appellant

vs.

BMW OF NORTH AMERICA INC.

Defendant, Appellant and Cross-Respondent

Appeal from the Judgment of the Superior Court
of California, County of Placer
Honorable J. Richard Couzens, Judge

APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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3 Civil C018430

IN THE COURT OF APPEAL

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APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

LISA A. JENSEN

Plaintiff, Respondent and Cross-Appellant

vs.

BMW OF NORTH AMERICA INC.

Defendant, Appellant and Cross-Respondent

Appeal from the Judgment of the Superior Court
of California, County of Placer
Honorable J. Richard Couzens, Judge

APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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APPELLANT'S REPLY BRIEF

I. INTRODUCTION

Defendant, Appellant and Cross-Respondent BMW of North America, Inc. (hereinafter "BMW") submits this brief in reply to Plaintiff, Respondent and Cross-Appellant Lisa A. Jensen's (hereinafter "Respondent") brief. Because Respondent's brief contains numerous mischaracterizations of the evidence, BMW has been forced to file this rather lengthy reply brief. Generally, issues raised by Respondent will be addressed in the order that they are presented in Respondent's brief.

Given the arguments made in BMW's Opening Brief and within this brief, the judgment of the lower court based on the jury's verdict must be reversed and judgment entered instead for BMW; in the alternative, the case should be retried.

II. CLARIFICATION OF FACTS

Respondent provides a statement of facts which purports to set out the trial evidence. (RB 1-11.)[1/] BMW questions the accuracy of Respondent's citation to the record and provides the following analysis of some of the more pertinent facts; other relevant facts are referenced in BMW's Opening Brief (AOB 3-10)[2/] and in later sections of this brief. BMW will not exhaustively review the facts relating to the substantiality of the evidence in this section as they are addressed in detail below.

A. THE FRONT-END SHIMMY WAS REPAIRED EACH TIME THE VEHICLE WAS BROUGHT IN FOR SERVICING

Respondent has misrepresented the number of times the subject vehicle was brought to a BMW dealership for service on the brakes. (RB 2.) She claims that brake repairs were sought twice at Stevens Creek BMW, but the evidence does not support this contention. First, the dealer's hard copies of the repair orders do not reflect this problem. (RT 331:7-9; Exhibit 88.) The service advisor at Stevens Creek BMW who completed the

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[1/] The abbreviation "RB" is used to designate Respondent' and Cross Appellant's Brief.

[2/] The abbreviation "AOB" is used to designate Appellant's Opening Brief.

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March 1989 repair order, **Mr. William Tveitnes**, testified he does not remember Respondent ever contacting him about a brake complaint. (RT 334:18-21.) Second, respondent admitted that she could not "say exactly" whether she reported brake problems in February 1989 and could not find the repair order. (RT 124.) Third, Respondent admitted she was not the person who met with the service advisors when the car was left at the dealership in March 1989. (RT 127:3-13.) Fourth, she admitted that she did not see anyone at the dealership write the entry "car shakes while braking" on her photocopy of the March 1989 repair order. (RT 128:17-27.) Finally, Respondent testified on the stand that her husband later drove the car home from the dealership, though in her deposition she testified that she had driven home from the dealership. (RT 129:26-130:1, 154:22-156:24.)

Respondent also misrepresents the record when she claims that the car was taken to Roseville BMW on five occasions for repairs. (RB 2.) In fact, the October 1990 visit was to install parts ordered in August of 1990. (RT 417:17-418:4.) The December 1991 visit was for an inspection by BMW personnel. (RT 422:22-28.) Thus, the vehicle was only brought to Roseville BMW on three occasions for repairs. (AOB 4; Exhibits 32, 34, 42, 90.)

BMW believes that Respondent has selectively presented the evidence regarding the severity of the brake shimmy so as to make it seem worse than it was. (RB 3.) Respondent's expert, **Mr. Thomas Stark**, testified that when he felt the car shudder, the steering wheel only moved three-eighths to one-half of an inch. (RT 215:16-19.) He did not have any trouble steering the car, did not lose control of it, and was able to brake the vehicle. (RT 215:20-216:1.) **Mrs. Frances Raczynski**, Respondent's mother, testified that Respondent never had difficulty stopping the vehicle and never lost control of the vehicle while **Mrs. Raczynski** was with her. (RT 261:13-22.)

B. LACK OF MAINTENANCE AND AN ABUSIVE DRIVING STYLE CAUSED THE BRAKE SHIMMY

In her brief, Respondent inaccurately depicts the facts regarding her lack of

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maintenance on the car and her abusive driving style. (RB 5-7.) Many of these factual inaccuracies are addressed later in this brief in the section on substantiality of the evidence. (See, section III.B., *supra*.) Several are worth noting here.

The evidence is undisputed that the tires and rims were not proper for the vehicle. Respondent claims that the tires and rims did not contribute to the shudder. (RB 6.) BMW's expert, **Mr. Peter Barron**, explained in detail that the tires put on by Respondent were not recommended for Respondent's car. (RT 486:12-491:19, 559:4-26.) Further, he testified that the side wheels were of a different dimension on the left side than on the right side. (RT 497:2-503:11.) Respondent suggests that BMW has not warned its customers which types of tires and rims to purchase. (RB 6.) She fails to point out that in response to a question posed by a juror, **Mr. Barron** testified that the reason BMW does not include tire specifications in its owner's manual is because of continuous developments and differences in tires. (RT 569:6-26.) BMW recommends that replacement tires be of the same brand or an equivalent tire; those on Respondent's car were not. (RT 569:27-570:3.)[3/]

Finally, Respondent has failed to rebut BMW's evidence that the car suffered from an extreme lack of maintenance by Respondent. (AOB 36-40.) Her failure to rebut these facts must illustrate her agreement that the car was neglected.

C. BMW HAD A GOOD FAITH BELIEF THAT NEITHER A REFUND NOR REPLACEMENT WAS WARRANTED

All of the evidence strongly supports BMW's contention that it was reasonable in believing that Song-Beverly was not applicable to Respondent's vehicle. This issue was addressed in Appellant's Opening Brief and is addressed later in this brief.

[3/] Respondent also refers to the fact that **Mr. Barron** has identified other instances of customer abuse causing brake induced vibration on BMW automobiles. (RB 6-7.) The existence of three such instances of customer abuse is hardly surprising, given the number of BMW automobiles performing on the roads. It is not as though **Mr. Barron** has never found problems with BMWs. On at least two occasions his reports to BMW have resulted in recall campaigns, unrelated to brakes. (RT 556:9-21.)

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(AOB 42-43; See, section III.B., *supra*.) Nonetheless, given the amount of time which Respondent devotes to this issue in her statement of facts, BMW feels obligated to comment briefly on her inaccurate characterization of the facts.

BMW's service and parts consultant, **Mr. Rolf Hanggi**, testified that as early as October 1991 he told Respondent that BMW could offer her a trade assist to help her get into another BMW. (RT 281-282.) This offer was made to assist a customer and help keep her satisfied. (RT 282.) It was not an offer for a replacement. (RT 281.) **Mr. Hanggi** felt, however, that BMW could also permanently address the shimmy complaint. (RT 281.) BMW offered to repair the problem. (RT 284.)

Mr. William Butler, BMW's area manager, testified that at the December 1991 meeting with Respondent, BMW was willing to address the shimmy complaint or arrange a trade assist. (RT 356.)[4/] He did not feel that a refund or replacement was appropriate based on the facts presented to him. (RT 356.) Namely, the vehicle had many miles on it and there was no record of maintenance having been performed on the vehicle. (RT 357.) **Mr. Butler** explained to Respondent at the December 1991 meeting that a refund or replacement was not appropriate. (RT 358; cf., RB 8.)

D. BMW'S TRADE ASSIST OFFER WAS A LEGITIMATE ATTEMPT TO ASSIST A CUSTOMER

Respondent boldly asserts that BMW's attempt to assist Respondent with a trade assistance arrangement was "a sham." (RB 9.)[5/] This assertion is wholly unmerited and unsupported.

[4/]Respondent refers to testimony by **Mr. Butler** indicating that there is a difference in value between a 300 series and a 500 series model. (RB 8 n.45.) This evidence is irrelevant since a replacement was not being considered.

[5/] Respondent provides absolutely no support for her assertion that, "'trade assistance' is a euphemism for a form of damage control, which almost never makes the consumer whole." (RB 9.) BMW's **Mr. Butler** provided the court with a definition of trade assistance: "A trade assistance is basically where we try and assist the customer into getting into another vehicle, buying it at dealer cost with the dealer's agreement, and getting a fair value for her car." (RT 356:12-15.)

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BMW objected to Respondent's use of entirely hypothetical numbers in an attempt to demonstrate that BMW's offer of trade assistance was bogus. (RT 372, 378, 379, 380.) Nonetheless, the line of questioning was allowed to proceed under the guise of a hypothetical, although Respondent's attorney later argued in closing as though the numbers represented what had actually happened in this case. (RT 621:18-623:5.)

Respondent's hypothetical is based entirely on erroneous and misleading numbers created by the imagination of Respondent's counsel. First, Respondent attempted to establish a payoff price for the vehicle by using a figure quoted in a November 10, 1992 letter from BMW Leasing Corporation. (RT 371-372; Exhibit 89.) The trade assist discussion took place nearly one year before the date of the letter, in December 1991. Even the trial judge noted in the jury's presence that a realistic payoff would have to be established in order that the jury not be misled. (RT 373:26-374:2.) **Mr. Butler** disagreed with Respondent's attorney regarding whether the initial value would have been $23,000.00, after which Respondent's attorney argued with him regarding penalties, etc. (RT 374:22-375:13.) Further, Respondent's counsel admitted that the number was an approximation. (RT 373:18-21.)

Second, Respondent resorted to guess work in determining that a figure of $2,000.00 represented the amount that BMW would have contributed to the trade assist deal. (RT 374.) It is clear from the testimony that **Mr. Butler** did not recall the actual figure. (RT 374:12-17.) Yet Respondent's attorney proceeded on the assumption that $2,000.00 was the amount. (RT 374:18.)

Third, **Mr. Butler** testified that he could not remember the retail or dealer price of a 1992 model 325i. (RT 376.) The hypothetical became even more attenuated when Respondent's attorney used a "pretty close" figure of $25,000.00 as the retail price. (RT 376.) Fourth, tax and license costs were guessed to be "about" $1,500.00. (RT 376.) Finally, **Mr. Butler** repeatedly asserted that he was uncertain about the numbers which counsel was presenting to him. (RT 374:17, 376:17, 377:6-10, 378:14-28, 379:3-4.)

After referencing these hypothetical numbers not based on any realistic

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ground, Respondent's attorney proceeded to assert that BMW was "going to try to get BMW leasing, BMW Credit, this GE outfit, this loan company back in Illinois, to agree to a lease on a 325i for $35,500.00,plus or minus . . . ."(Rt 377:2-5.) **Mr. Butler** testified that he did not know such numbers to be factual. (RT 377:6.) They might be correct in the hypothetical situation, but **Mr. Butler** clearly could not remember the numbers which were applicable to Respondent's actual situation. (RT 377:8-10.) Thus it is clear that Respondent's attorney switched from using these numbers in a "hypothetical" sense to urging them as actual ones, thereby confusing the jury. Respondent's use of a patently false hypothetical was misleading to the jury.

Ultimately, the trade assist effort was unworkable, not because of BMW's unwillingness to enter into it, but because of Respondent's poor credit. Respondent plainly misstates the facts when she asserts that there was no proof she had credit problems. (RB 8 n.48.) **Mr. Butler testified** that Respondent was denied credit primarily because of late payments. (RT 360-361.) BMW tried to assist Respondent in spite of her credit problem in that **Mr. Butler attempted** to convince the sales manager to make an exception for Respondent. (RT 361:7-15.) Respondent admitted that she was late on some payments for the BMW through November 1991. (RT 99.) She could not recall why she was assessed five or six late charges between approximately October 30, 1989 and March 30, 1990. (RT 114:23-115:12.) She was also assessed late charges on eleven occasions between approximately April 30,1990 and May 30, 1991. (RT 115-116.) When Respondent presented a credit report as evidence, she blacked out portions of it and testified she could not remember if any other adverse credit marks were on the report. (RT 590.)

It is clear that BMW's trade assist offer, rather than being a sham, was a legitimate attempt to assist respondent out of good will toward a customer whose payment record for the vehicle was spotty and whose ability to pay for another vehicle was in question.

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III. LEGAL DISCUSSION

A. SONG-BEVERLY IS NOT APPLICABLE TO RESPONDENT'S CAR

1. SONG-BEVERLY'S DEFINITIONS DICTATE THAT THE TANNER CONSUMER PROTECTION ACT DOES NOT APPLY TO USED VEHICLES

California Civil Code section 1791 provides definitions for use in Song-Beverly. Later sections of the statute must be read with these general definitions in mind. By definition, "consumer goods" are new products, except where assistive devices are concerned. (AOB 12; Cal. Civ. Code § 1791(a).) The definitions of "buyer" and "manufacturer" include the term "consumer goods" as part of their definitions. (AOB 12; Cal. Civ. Code §§ 1791(b), 1791(j).) Therefore, where the terms "consumer goods," "buyer," or "manufacturer" are used in the statute, new products--and not used ones--are covered. (AOB 12.) Under the general replace or reimburse provision of Song-Beverly, "the manufacturer shall either replace the goods or reimburse the buyer . . . ." (Cal. Civ. Code § 1793.2(d)(1) (emphasis added); AOB 13.) Under the new motor vehicle replace or reimburse provision, "the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer . . . ." (Cal. Civ. Code § 1793.2(d)(2) (emphasis added); AOB 13.)

These definitions make it clear that new products are always contemplated where the statute uses the terms "consumer goods," "buyer," or "manufacturer." Based on the general definitions found in Song-Beverly, the legislature did not intend for the definition of "new motor vehicle" in section 1793.22(e)(2) to apply to used motor vehicles.

In her brief, Respondent argues that BMW is incorrect in its analysis because the 1987 amendment to Song-Beverly is later in time than the original definitions and the specific definition of new motor vehicle governs over the general definition of "consumer goods." (RB 19-20.)

It is true that, "broadly speaking, a specific provision relating to a particular subject will govern in respect to that subject as against the general provision . . . ."

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(Natural Resources Defense Council, Inc. v. Arcata Nat. Corp. (1976) 59 Cal.App.3d 959, 965.) At the same time, however, the statutes and codes blend into each other, and are to be regarded as constituting a single statute. (People v. Squire (3d Dist., 1993) 15 Cal.App.4th 235, 240; Natural Resources Defense Council, Inc. v. Arcata Nat. Corp. 59 Cal.App.3d at 965.) Even if a statute legislates generally on a subject while another statute legislates specially upon the same subject with greater detail, the two statutes should be reconciled and construed so as to uphold both of them if it is reasonably possible to do so. (Natural Resources Defense Council, Inc. v. Arcata Nat. Corp., 59 Cal.App.3d at 965.)

It is abundantly clear that the legislature did not mean to expand the definition of "new motor vehicles" to be in conflict with the general definitions of Song-Beverly. This is apparent when one considers the purpose of Song-Beverly to apply to new products except where used products are specifically mentioned, the legislature's choice of the term "new motor vehicles," and the other arguments regarding interpretation presented in BMW's Opening Brief (AOB 14-23) and in this brief, infra. This court should interpret section 1793.22(e)(2) to refer only to new products as considered by the general definitions in section 1791.

2. THE DEFINITION OF "NEW MOTOR VEHICLE" IN THE TANNER CONSUMER PROTECTION ACT CLEARLY AND UNAMBIGUOUSLY EXCLUDES COVERAGE FOR RESPONDENT'S USED VEHICLE

The plain language of California Civil Code section 1793.22(e)(2) excludes coverage under Song-Beverly for a used car such as that owned by Respondent. (AOB 14-16.) The statute defines five types of new motor vehicles: the chassis, chassis cab, that portion of a motor home devoted to its propulsion, a dealer-owned vehicle, and a demonstrator. (Cal. Civ. Code § 1793.22(e)(2).) Additional language in the statute referring to "other motor vehicle[s] sold with a manufacturer's new car warranty" is clearly intended to provide clarification for the term "demonstrator" which precedes it. (AOB 15-16.) Such an interpretation is supported by review of the use and placement of the words

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"and" and "or."[6/](AOB 14-16.) Further, this interpretation is consistent with the idea that the automotive industry does not use the term "demonstrator" exclusively; terms such as "factory executive model," "dealer model," and "demonstrator executive vehicle" are used synonymously with "demonstrator."[7/]

BMW's interpretation of the statute is consistent with the analysis provided in the Legislative Counsel's Digest. (AOB 16.) That analysis merely notes the expanded coverage for and definition of "demonstrators." (AOB 16.) The digest does not discuss extending Song-Beverly protection to all used cars with remaining coverage under a new car warranty. (AOB 16.)

In spite of BMW's careful explanation of its analysis of the statute, Respondent argues that BMW is attempting to have the court interpret the statute such that the phrase "or other motor vehicle sold with a manufacturer's new car warranty" would have no separate meaning. (RB 15.) Such an assertion patently misrepresents BMW's argument. In fact, BMW has taken great pains to describe to this court that the phrase has the specific purpose of helping to define what is meant by the term "demonstrator." As such, the phrase has "meaning and . . . perform[s] a useful function." (White v. County of Sacramento (1982) 31 Cal.3d 676, 681.) Interpreting the statute as BMW suggests, and as the Legislative Counsel and the Ibrahim[8/] court apparently

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[6/] Respondent's brief suggests that BMW is not using the word "or" disjunctively to designate alternative categories as the White court suggests. (RB 14 n. 67.) This assertion is incorrect. As BMW has said in its Opening Brief, "[t]he use of the word 'or' between the two phrases in section 1793.22(e)(2) provides for alternative terms to describe the concept of a 'demonstrator' vehicle." (AOB 15 (emphasis added).) Thus, BMW properly interprets the use of the word "or" consistent with White v. County of Sacramento. ((1982) 31 Cal.3d 676.)

[7/] Respondent is critical of BMW's assertion that the term "demonstrator" is not used exclusively in the industry, criticizing BMW for not citing "authority" to support this well-known fact. (RB 15.) Yet Respondent thereafter provides her own definitions for the terms provided by BMW and cites no authority for her definitions. (RB 15.)

[8/] Respondent ignores the fact that the First District Court of Appeal in Ibrahim v. Ford Motor Company recognized that the amended definition of "new motor vehicle" merely "add[s] dealer-owned 'demonstrator' vehicles and certain portions of motorhomes." (Ibrahim

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interpreted it, would not render the phrase mere surplusage. (See, White v. County of Sacramento, 31 Cal.3d at 681.)

Respondent asserts that the plain meaning of the phrase "other motor vehicle sold with a manufacturer's new car warranty" is to designate a category of automobiles for protection under Song-Beverly which have "no history of use by a manufacturer's employee, as a daily rental car or as a demonstrator." (RB 15.) This assertion is made without reference to any authority whatsoever. There is simply no evidence from trial, or for that matter in Respondent's brief, which supports the idea that the statute plainly refers to vehicles "with no history of use by a manufacturer's employee" or "as a daily rental car." Respondent is simply inventing arguments from whole cloth. On the other hand, BMW has demonstrated to the court that the specific language and punctuation of the statute mandate that the statute plainly means that the phrase "or other motor vehicle[s] sold with a manufacturer's new car warranty" helps to define what is meant by "demonstrator."

The lower court did not attribute to the language of the statute its plain meaning and, therefore, erred in its interpretation of the statute. (Wallace v. Department of Motor Vehicles (1970) 12 Cal.App.3d 356, 360 hearing denied, 1/17/90.) The interpretation of a statute and its application to a given set of facts being a matter of law, it is appropriate for this court to reverse the lower court's judgment. (Haworth v. Lira (1991) 232 Cal.App.3d 1362, 1367.)

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v. Ford Motor Co. (1989) 214 Cal.App.3d 878, 885 n.6.) Such an omission on Respondent's part is interesting in light of the fact that Plaintiffs and Appellants in that case were represented by the law firm of Kemnitzer, Dickinson, Anderson & Barron, the law firm representing Respondent on this appeal. (Id. at 882.)

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3. LEGISLATIVE INTENT DICTATES THAT RESPONDENT'S VEHICLE WAS NOT ENTITLED TO SONG-BEVERLY PROTECTION AS AGAINST THE MANUFACTURER

If this court concludes that the language of the statute is not clear and unambiguous, then the court must look at the intent of the legislature by looking at all the circumstances, including the consequences that will flow from a particular interpretation. (In re Christopher R. (1993) 6 Cal.4th 86, 91; Estate of Ryan (1943) 21 Cal.2d 498, 513.)

BMW has previously pointed out that there is no extrinsic authority for the proposition that the legislature meant to change the definition of "new motor vehicle" so dramatically as to include every used motor vehicle with a remaining manufacturer's limited warranty. (AOB 17-18.) This silence is tell-tale proof that the legislature did not propose a sweeping change in the coverage of Song-Beverly to include all used cars sold with the balance of a manufacturer's new car warranty. The author of the bill does not mention a change in coverage in her letter to Governor Deukmejian. (AOB 18; AOB Exhibit 2.) No automobile manufacturers opposed the bill, which they surely would have done if there was a massive change in the definition of "new motor vehicle" to include all used vehicles sold with the balance of a manufacturer's new car warranty. (AOB 18; AOB Exhibit 2.) The Enrolled Bill Report submitted to the Governor specifically refers to "'demonstrator' vehicles sold with a manufacturer's new car warranty." It is clear that the phrase "sold with a manufacturer's new car warranty" modifies the term "'demonstrator' vehicles." There is not a separate category which includes all vehicles sold with a manufacturer's new car warranty. (AOB 18; AOB Exhibit 3.) In light of this complete omission of any reference to a monumental change in the definition of "new motor vehicles," it is incomprehensible that such a change was intended.

Respondent has completely failed to rebut BMW's argument regarding legislative intent. She ignores all of the legislative history cited in BMW's Opening Brief and summarized in part above. (RB 20.) Whereas BMW has completed extensive research on the legislative history of the amendment and has provided such information

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for this court, Respondent is content to provide the court with no support for her interpretation of the amendment. Rather, she attempts to hoodwink the court and lead it down a path created by the emotional appeal of "protecting consumers" through her assertion that consumers can only be protected if the statute is read to include within Song-Beverly's new car provisions those used vehicles purchased with the balance of the new car warranty. (RB 16.)

As BMW has pointed out, however, a consumer who purchases a used car with the balance of a manufacturer's new car warranty would not be without legal recourse. (AOB 25.) Such a consumer would still have Song-Beverly protection under section 1795.5 which places obligations on the distributor or retail seller of used consumer goods in which an express warranty is given. (AOB 25; See, Cal. Civ. Code § 1795.5.) If the manufacturer makes a new express warranty, Song-Beverly would apply against the manufacturer under section 1793.2. (AOB 25; See, Cal. Civ. Code § 1793.2.) The consumer would also have all traditional contract remedies which might be applicable to the facts of her case. (AOB 25.)

What Respondent would have this court overlook is the fact that applying Song-Beverly's new car provisions to used cars such as Respondent's allows the consumer to improperly benefit from generous presumptions and a civil penalty. All of these benefits would be conferred upon the purchaser of a used car, no matter how old the car, how many miles are on it, or the fact that the buyer paid a heavily depreciated price for the vehicle. (AOB 20.) Under Respondent's proposed interpretation of the statute, the manufacturer would be tremendously handicapped in raising defenses provided by Song-Beverly since, for example, the manufacturer would have grave difficulty proving a consumer's unreasonable use of the vehicle where multiple successive owners are involved. (AOB 19.)

Respondent would have this court believe that BMW's argument on this point is "nonsense." (RB 17.) The point is not whether a manufacturer could possibly identify the various subsequent owners of an automobile and attempt to depose them

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during the course of Song-Beverly litigation; it is conceivable that with enough time and money spent on the endeavor, the manufacturer might eventually track down most subsequent owners.[9/] Rather, the point is that a tremendous burden is placed on the manufacturer in order for it to raise defenses against the Song-Beverly new car provisions which heavily favor the consumer--that is, a consumer who knew very well that she was not getting a new car and did not pay a new car price. The subsequent buyer of a used and depreciated car gets the benefits of all of Song-Beverly's generous presumptions, but the manufacturer is burdened even further than in the new car scenario the legislature envisioned.

The effect of Respondent's interpretation of the legislature's intent is that manufacturers will be exposed to the increased liability of paying damages and a civil penalty for the entire life of the manufacturer's express warranty. It is no exaggeration that the potential fiscal effect on manufacturers will be monumental. Simple economics dictate that this liability will be passed along to dealers and consumers. Manufacturers and their selling dealers doing business in California will be forced to react by limiting their exposure to such liability by demanding higher prices for cars and/or by shortening their express warranties to the statutory minimum period.

While Respondent would have the court believe that her interpretation of 1793.22 is nothing new, it is in fact a significant expansion of the statute's coverage and will, inevitably, lead to an explosion of law suits.

If the lower court and Respondent's interpretation of the statute is allowed to stand, the practical difficulties, inconvenience, hardship, and gross unfairness to manufacturers would be onerous and wholly unprecedented under traditional contract law. If the purpose behind Song-Beverly is to protect consumers, it would be ironic if the Act were interpreted in such a way that it would lead to a manifest decline in trade and

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[9/] Although Respondent claims DMV records are a source of information regarding prior owners, a person's fundamental right to privacy limits a manufacturer's ability to access these records.

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commerce in this state, creating great inconvenience for consumers. It is clear that Song-Beverly should not be interpreted to include every used motor vehicle sold with a remaining manufacturer's new car warranty.

4. THIS COURT NEED NOT FOLLOW THE CLEARLY ERRONEOUS AND UNAUTHORIZED INTERPRETATION OF THE STATUTE BY THE CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS

Respondent asserts that BMW's interpretation of Song-Beverly is in conflict with the interpretation by the California Department of Consumer Affairs. (RB 17-18.) She fails to provide argument or evidence in favor of this conclusion.

California Code of Regulations section 3396.1 contains definitions pertaining to the arbitration program provided for by Civil Code section 1793.2(e). (16 Cal. Code. Regs. § 3396.1.) The California Department of Consumer Affairs has improperly interpreted the statute, defining a "new motor vehicle" to include: ". . . a dealer-owned vehicle, a 'demonstrator,' and any other motor vehicle sold or leased with a manufacturer's new car warranty." (16 Cal. Code Regs. § 3396.1(k) (emphasis added).) Clearly the Department has assumed that the legislature intended for "other motor vehicles sold or leased with a manufacturer's new car warranty" to be a separate category under Song-Beverly. The Department has replaced the word "or" found in Song-Beverly with the word "and" between "demonstrator" and the phrase "other motor vehicle sold . . . with a manufacturer's new car warranty." Further, the Department has modified "other motor vehicle sold . . . with a manufacturer's new car warranty" by placing the word "any" immediately in front of the phrase. The effect of these changes is to dramatically alter the wording and plain meaning of the Tanner Consumer Protection Act.

Contemporaneous construction of a statute by administrative officials charged with its enforcement or interpretation is not necessarily controlling but is entitled to great weight and will be followed if it is not clearly erroneous or unauthorized. (Central Delta Water Agency v. State Water Resources Control Bd. (1993) 17 Cal.App.4th 621, 631 (citing State of South Dakota v. Brown (1978) 20 Cal.3d 765, 777).) The final

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responsibility for interpreting a statute, however, rests with the courts. (Civil Service Commission v. Velez (1993) 14 Cal.App.4th 115, 120 (citing Gibson v. Unemployment Insurance Appeals Bd. (1973) 9 Cal.3d 494, 498).) Administrative practice is to be considered but need not inevitably be followed. (State Board of Equalization v. Board of Supervisors (1980) 105 Cal.App.3d 813, 821 (citing Whitcomb Hotel, Inc. v. California Employment Commission ((1944) 24 Cal.2d 753, 757)).) Administrative construction of a statute cannot prevail when a contrary legislative purpose is apparent. (Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal.3d 101, 117.)

Although the Department of Consumer Affairs has interpreted the statute, its interpretation need not be followed if the court determines that the Department's interpretation is clearly erroneous. It is clear from the discussion contained in BMW's Opening Brief (and in the preceding portions of this brief) that the Department's interpretation is clearly erroneous and unauthorized. (AOB 14-20.) This court should not be persuaded by Respondent's argument that the Department's interpretation must be followed.

5. THE LOWER COURT'S INTERPRETATION OF THE STATUTE CREATES AN UNTENABLE CONFLICT WITH THE VEHICLE CODE

In its Opening Brief, BMW clearly articulates that interpreting Song-Beverly (and particularly the Tanner Consumer Protection Act) to apply the new car provisions of Song-Beverly to a used, previously registered vehicle such as Respondent's creates an untenable conflict with the Vehicle Code. (AOB 20-22.) Under the applicable sections of the Vehicle Code BMW could not have called the subject vehicle "new" since it had been previously registered. (Cal. Veh. Code §§ 430, 665.) The car was not the same as a "demonstrator" vehicle which would not have been previously registered. While the car is used under the Vehicle Code, it would be "new" for purposes of Song-Beverly, based on Respondent's interpretation. If Song-Beverly is interpreted as the lower court determined, there is irreparable conflict between the two codes. The most reasonable method of

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resolving this conflict is for this court to hold that a "new motor vehicle" under Song-Beverly does not include one which has been previously registered. The language "or other motor vehicle sold with a manufacturer's new car warranty" should be interpreted as an alternative way of describing a "demonstrator" for purposes of Song-Beverly.

Respondent's response to BMW's argument is scant, at best. She merely states that "the Vehicle Code definitions have no bearing on what vehicles are covered under the Song-Beverly Act." (RB 19.) She offers no authority for this proposition and offers no authority to refute BMW's proposition that the two codes should be "reconciled and construed in a manner which will uphold both of them if it is reasonably possible to do so." (AOB 21 (quoting People v. Squire (3d Dist., 1993) 15 Cal.App.4th 235, 240).)

It is reasonably possible to reconcile and construe Song-Beverly such that there is no conflict with the Vehicle Code definitions of new and used vehicles. Finding that Song-Beverly was intended by the legislature to apply to demonstrator type vehicles but not to used vehicles will accomplish this goal.

6. HOLDINGS FROM OTHER STATES REGARDING LEMON LAWS ARE INSTRUCTIVE

BMW has cited this court to authority which demonstrates that the "lemon laws" of most states are similarly limited to new vehicles. (AOB 22.) Further, other states, such as Oregon, have interpreted their "lemon law" statutes' definitions of "used" vehicles to include Respondent's vehicle as used. (AOB 22-23.) The law of these sister states is helpful to the court in understanding what the legislature might have considered when it amended Song-Beverly.

Respondent boldly states that the warranty laws of other states are not relevant to Song-Beverly. (RB.) She offers no authority whatsoever for this proposition.

The California Supreme Court has recognized that holdings from other states are not controlling, but may be considered in conducting statutory analysis. (Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 298, hearing denied, 10/13/88.) This court is certainly entitled to consider the law of sister states in

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interpreting what the California legislature meant to accomplish when it added the Tanner Consumer Protection Act to Song-Beverly.

7. BMW NEVER MADE AN EXPRESS WARRANTY TO RESPONDENT

Under Song-Beverly, express warranties made by a dealer in connection with the sale or lease of a used motor vehicle do not impose liability on the manufacturer. (Cal. Civ. Code § 1795.5.) Generally, a manufacturer is liable when it gives an express warranty (Gherna v. Ford Motor Co. (1966) 246 Cal.App.2d 639, 651) or where the purchaser relies on representations made by the manufacturer. (Funding v. Chicago Pneumatic Tool Co. (1984) 152 Cal.App.3d 951, 957 (citing Burr v. Sherwin Williams Co. (1954) 42 Cal.2d 682, 696).)

BMW never made an express representation to Respondent that the remainder of the manufacturer's new car warranty would be applied to the subject vehicle. (AOB 24.) Although the dealer may have made such a representation to Respondent, the dealer's potential liability under section 1795.5 does not impose liability upon BMW as the manufacturer. (AOB 24; See, Cal. Civ. Code § 1795.5.)

In her brief, Respondent cites pages 50 and 51 of the Reporter's Transcript as support for her assertion that Respondent was told that she would get the benefit of the manufacturer's warranty. (RB 20.) Respondent's actual trial testimony makes no mention of an express representation by BMW that the manufacturer's warranty would be applied by BMW to the vehicle. (RT 50:20-51:3.) Rather, she asserts that the salesman told her she would "get the thirty-six thousand mile warranty on top of the miles that were on the car." (RT 50:20-24 (emphasis added).) By Respondent's own testimony, she expected her warranty to last until the car had forty-three thousand miles on it. (RT 51:2-3.) Given that the original manufacturer's warranty was for a period of three years or thirty-six thousand miles, whichever occurred first, Respondent clearly was not being offered the

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manufacturer's warranty.[10/] Rather, she was at most being offered a warranty by the dealer to cover the vehicle for forty-three thousand miles. The record establishes that the dealer, rather than BMW, extended a warranty to Respondent.

Respondent asserts in her brief that BMW paid for repairs under an express warranty. However, she fails to cite any authority in the record for such a proposition. On the other hand, there is extensive testimony in the record by witnesses indicating that BMW paid for certain repairs out of an interest in maintaining customer "good will," not because BMW felt the vehicle was under warranty.

Mr. Rolf Hanggi, service and parts consultant for BMW of North America, testified that he thought BMW's commitment to Respondent was because of customer satisfaction and good will. (RT 290.)

Mr. Christopher J. Hearty, Service Manager for Roseville BMW, told the jury that BMW made repairs on Respondent's vehicle for "good will" reasons. (RT 413:19-24, 414:16, 418:18-22, 421:24-26, 427:4-7.) Further, **Mr. Hearty** testified that Roseville BMW used the "warranty receipt" to obtain reimbursements from BMW, even if the work was done under good will. (426:24-427:3.) On cross-examination, **Mr. Hearty** testified that he wrote "free labor and free tire rotation and balance" on the hard copy of the August 20, 1990 repair order, indicating that he was not referring to warranty work. (RT 429:23-430:1; Exhibit 32.)

BMW made no explicit representations to Respondent regarding a warranty. Under the terms of the original warranty to the original owner, BMW is only accountable to a buyer or lessee in privity with it, not to subsequent buyers. Therefore, BMW is not liable under the manufacturer's limited warranty and made no new express or implied warranty to Respondent. While the dealer who leased the vehicle to Respondent may be liable under Song-Beverly, BMW, as the manufacturer, clearly is not liable.

[10/] The manufacturer's limited warranty is Trial Exhibit 13 and is quoted in Appellant's Opening Brief. (Trial Exhibit 13; AOB 24 n.14.)

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8. BMW IS NOT ESTOPPED FROM DENYING SONG-BEVERLY'S APPLICABILITY IN THIS MATTER

Respondent raises two arguments in support of the proposition that BMW is estopped from denying Song-Beverly's application to Respondent's car. (RB 18.) Both arguments are without merit.

First, she argues that BMW attempted to repair the vehicle under warranty, that such warranty repairs were paid for by BMW, and that no one ever told Respondent that she was not getting the benefit of the new car warranty. (RB 18.) Respondent offers no authority, argument, or analysis of any kind in support of application of the doctrine of estoppel based on these facts.

Concerning estoppel, the burden of proof is on the party who seeks to have an estoppel declared. (State Compensation Ins. Fund v. Workers' Compensation Appeals Bd. (1985) 40 Cal.3d 5, 16.) Certainty is essential to all estoppels. (National Dollar Stores v. Wagnon (1950) 97 Cal.App.3d 915, 920.) Therefore, that party must prove the essential elements, with nothing being left to surmise or questionable inference. (Bank of California v. Connolly (1973) 36 Cal.App.3d 350, 365.) The doctrine of estoppel is strictly applied and must be substantiated in every particular. (El Camino Community College Dist. v. Superior Court (1985) 173 Cal.App.3d 606, 614.) Since Respondent has failed to substantiate facts equalling an estoppel, she has failed to meet her burden of proof and may not prevail.

Further, those facts which are referenced by Respondent in her brief are not themselves established. She alleges that she was leased the vehicle with the balance of the "new car warranty provided by BMW" and that BMW and its dealers made repairs on the vehicle under the manufacturer's warranty. (RB 18.) BMW has pointed out in this brief that the full manufacturer's limited warranty did not apply to Respondent since she was a subsequent purchaser of the vehicle. (See, section III.A.7.,*supra*.) BMW has also shown that repairs made on the vehicle were made for reasons of customer good will and not because of any existing warranty obligation. (See, section III.A.7.,*supra*.)

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Second, Respondent claims that BMW is estopped from arguing that Song-Beverly does not apply because the leasing dealer allegedly told Respondent that the car was a "demonstrator." (RB 18.) She then asserts, in effect, that Ibrahim v. Ford Motor Co. ((1989) 214 Cal.App.3d 878, 889) stands for the proposition that a dealer is always an agent of the manufacturer for purposes of Song-Beverly. Such an assertion misrepresents the holding in Ibrahim. There, the court determined that the California Civil Code treats the dealer and the manufacturer as "a single entity" for purposes of determining whether a nonconformity has been subject to repair four or more times. (Ibrahim v. Ford Motor Co., 214 Cal.App.3d at 889.) The court's determination that the dealer and manufacturer are one entity must be limited to the factual context in Ibrahim. It is clear from the court's language that its remarks are limited to the repair determination scenario. There is nothing in the Ibrahim opinion to support an argument that a manufacturer and a dealer are always a single entity for all purposes under the Act.

Respondent has made no other effort to show that the record demonstrates an agency relationship existed between the dealer and BMW, nor that any statement made by the dealer was made in the course and scope of the alleged agency relationship. (See, Cal. Civ. Code § 2338.) The existence of an agency relationship and the making of a statement during the course and scope of the agency are factual issues which were not resolved at trial. As such, they may not be raised for the first time on appeal. (See, Richmond v. Dart Industries, Inc. (1987) 196 Cal.App.3d 869, 874, hearing denied, 2/3/88.)

Factually, BMW disputes Respondent's contention that the selling dealer represented to Respondent that the vehicle was a "demonstrator." Respondent's testimony on cross-examination suggests that while she was initially attracted to the dealership because of an advertisement for demonstrator vehicles, in fact she had a very specific request in terms of color, seat material, and other options. (RT 104, 107-109.) She was shown several vehicles and the vehicle she ultimately leased was not a demonstrator. Mr. Thomas Ratcliffe, Vice President and General Manager of Stevens Creek BMW, testified

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that there is no indication in the file that the subject vehicle was a demonstrator. (RT 323.)[11/] He indicated that a demonstrator would have been part of the dealership's new car inventory, but Respondent's car was a used vehicle purchased at a used car auction. (RT 323.)

Moreover, even if the manufacturer's limited warranty was enforceable by Respondent against BMW, it would be inapplicable under the facts in this case since the warranty excluded "wear and tear" items such as brakes. (AOB 4; RT 354, 413, 431.) The fact that BMW repaired the brakes does not create a warranty as to the brakes. BMW was not required to tell Respondent why the brakes were being repaired free of charge, as long as she was not being charged for the repairs. BMW should not be estopped from claiming that the Song-Beverly new car express warranty provisions do not apply with respect to Respondent's car.

Even if BMW provided the balance of the manufacturer's limited warranty to Respondent and the warranty was found to cover the brake repairs made to the car, the Tanner Consumer Protection Act does not apply because, as shown above, Respondent's vehicle was not a "new motor vehicle." (See, section III.A., *supra.*) Therefore, Respondent would not be entitled to pursue her claim under the provisions of the Tanner Consumer Protection Act. She would be limited to other provisions of Song-Beverly or to traditional causes of action. (See, section III.A.3.,*supra.*)

Finally, Respondent may not pursue her argument that BMW is estopped from denying the applicability of Song-Beverly because the issue of estoppel was never submitted to the jury for consideration. The judge commented that BMW was "estopped," but he never submitted a question of fact to the jury for decision. (RT 348.) Existence of an estoppel is ordinarily a question of fact. (Driscoll v. City of Los Angeles (1967) 67

[11/] **Mr. Ratcliffe** was asked on cross-examination about felt tip handwriting on the corner of Exhibit 10 which reads "Factory Demo." He indicated that it appears to refer to a 1988 BMW 528e. (RT 324-325.) He also indicated that he had no way of knowing whether a salesman might have misrepresented that the car was a demonstrator. (RT 326.) Still, the signed documents identified the vehicle as used. (RT 326.)

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Cal.2d 297, 305.) The issue is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference. (Id.)

In this matter, clearly there is conflicting evidence susceptible to more than one inference. Estoppel in this matter is a question of fact. As such, a question of fact exists which has not been properly litigated below. If a defense of estoppel is not raised in the pleadings or at the time of trial, it cannot be raised for the first time on appeal. (Juodakis v. Wolfrum (1986) 177 Cal.App.3d 587, 593, hearing denied, 5/8/86.) This court may not now consider that BMW is estopped to deny the applicability of Song-Beverly.

B. NO SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT FOR RESPONDENT

This court should set aside the lower court's ruling because Respondent has failed in several respects to present "substantial evidence" to support the judgment. (See, Fewel & Dawes, Inc. v. Pratt (1941) 17 Cal.2d 85, 89.)[12/]

First, Respondent failed to present substantial evidence in support of her claim that the repairs made by BMW did not conform the vehicle to the terms of the express warranty. BMW has previously illustrated in great detail that both Respondent's expert and BMW's expert testified that the repairs made on the vehicle were both reasonable and adequate. (AOB 34-35.) Testimony was also received from the service manager at Roseville BMW indicating that repair attempts were successful at eliminating the brake problems and that there was no brake defect. (AOB 35.) Respondent herself testified that the vibration would disappear after the car was serviced by BMW. (AOB 35; RT 72, 133, 144.)

Respondent refers this court and opposing counsel to her brief's statement of facts for support for her contention that BMW failed to repair a manufacturing defect. (RB 21.) More than "a mere scintilla" of evidence is required, however. (Estate of Teed

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[12/] See, Appellant's Opening Brief at 32-40.

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(1952) 112 Cal.App.2d 638, 644.) Further, "there must be more than a conflict of words to constitute a conflict of evidence." (Krause v. Apodaca (1960) 186 Cal.App.2d 413, 420.)

Respondent refers to evidence that a "shimmy" was felt in the subject vehicle. (RB 21-22.) Yet, Respondent does not present substantial evidence that the shimmy problem was not fixed each time. On the contrary, Respondent testified the problem would go away each time repairs were made and her expert testified that the repairs were adequate. (AOB 34-35; RT 72, 133, 144, 230.) Thus, Respondent's assertion that there must have been a defect because numerous repairs were required is not credible. Respondent claims that the service manager of Roseville BMW admitted the problem could not be resolved, but she fails to point out that on redirect examination **Mr. Hearty** testified that he knew of no evidence that the repairs did not take care of the problem each time. (AOB 35; RT 437.) He indicated that the problem could have redeveloped anew between repairs. (AOB 35; RT 437-438.) **Mr. Hearty** also testified that a final repair attempt would have resolved the problem completely. (RT 438.)

Respondent points to testimony by her expert and witnesses for BMW that indicates they felt the shimmy and that it was caused by the brake rotors and pads. (RB 22.) She cites the Reporter's Transcript in a misleading manner, however. Respondent indicates that BMW's service and parts consultant, Mr. Rolf Hanggi, told Mr. Butler that the cause of the shimmy was the brake pads. (RB 4.) In fact, Respondent's RT cite is to her counsel reading Mr. Butler's deposition. (RT 366.) Respondent fails to point out to this court that the witness indicated on direct and cross examination that he was told there was bluing on the rotors. (RT 353, 365.) This testimony is consistent with the source of the problem being the brakes, but it indicates that the cause of the problem was Respondent, rather than a manufacturing defect.

Further, Respondent is highly selective in her citation to the record regarding her expert's testimony. She merely indicates that her expert identified the cause as a combination of brake rotors and pads. (RB 4.) On cross examination, **Mr. Stark** admitted that the rotors were the cause of the "shudder" with possible contribution from

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the calipers. (RT 209.) He testified that the rotors were warped by intermittent heat induction. (RT 210:5-8.) And, he testified that he has no evidence the heat came from anything other than the Respondent's brake use. (RT 210:9-14.) This testimony is hardly substantial evidence of a manufacturing defect. If anything, it is substantial evidence that Respondent was the cause of the shuddering.

Respondent also suggests that brake shimmy was a known problem in BMW automobiles. (RB 22.) To support this claim she refers to testimony indicating that other BMW 528e owners had a brake shimmy problem. She also refers to a BMW technical service bulletin. Once again, however, Respondent is highly selective in the facts she presents. She neglects to mention that on redirect examination of **Mr. Hearty**, Service Manager at Roseville BMW, he explained that while he has seen brake complaints on 528e models and on the Three Series, the brake-induced vibration he saw on 528e models had been resolved or repaired with no further complaints. (RT 436-437.) The fact that the problem could be resolved easily points to driver-induced problems, such as were present in Respondent's car.

As to the technical service bulletin mentioned by Respondent, it did not indicate any defect with the vehicle's brake pads. (RT 521.) Rather, it instructed dealership service departments that a new, softer brake pad could be used in place of the original brake pad to eliminate perceived vibration caused by the original, harder pad. (RT 521-524.) The bulletin was not substantial evidence of a manufacturing defect.

Thus, the evidence is consistent on both sides of the case that Respondent's complaints were resolved each time. There is no real or substantial conflict in the evidence regarding the adequacy of the service performed by BMW.

Second, Respondent failed to present substantial evidence to refute BMW's defense that Respondent's unreasonable use of the vehicle caused a recurring brake problem. (AOB 36-39.) Respondent asserts in her brief that she has presented substantial evidence to show she did not cause the problem with her vehicle. (RB 22.) Her "substantial" evidence includes her testimony that her father taught her not to ride the

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brakes and therefore she does not ride the brakes. (RB 5.) It is inconceivable that such evidence is in any way, shape or form substantial. At best, it is interesting, but it is hardly compelling evidence.

As further evidence, Respondent points to the testimony of her expert who indicated that while he and Respondent were on a prearranged and monitored test drive she did not appear to ride the brakes. Of course, Respondent was fully aware that she and the expert were in the car for the express purpose of seeing how it performed and therefore, it is likely that she knew the expert was watching everything which occurred in the vehicle--including how Respondent drove. At a minimum, it is clear that Respondent was purposefully trying to duplicate the "shimmy" feeling; thus, she was obviously trying to brake as much as possible, indicating she was not demonstrating her normal day-to-day driving habits. Her expert, **Mr. Stark,** testified that Respondent used the brakes more than normal to try to induce a vibration. (RT 214.) This evidence, then, is not "reasonable in nature, credible, and of solid value." (Estate of Teed, 112 Cal.App.2d 638 at 644.) It is not substantial.

Respondent further argues that she was never told she was the cause of the brake shimmy problem and that the repair orders contain no reference to her as the cause. (RB 22-23.) Such evidence, even if true, is not relevant to whether Respondent caused the brake problems. It does not refute the possibility that Respondent "rode the brakes" and failed to properly maintain the vehicle.

Respondent has failed to demonstrate that her lack of maintenance was not the cause of her car's problems. In her brief she attempts to confuse the issue by referring to BMW's expert's testimony in other cases. (RB 6-7.) The issue is not whether **Mr. Barron** has testified in other BMW cases. Rather, the issue is whether Respondent provided substantial evidence that something other than her lack of maintenance on the car and abusive driving style caused its brake problems. She has not provided any such evidence.

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Third, Respondent has failed to present substantial evidence to support the award of a civil penalty. Respondent had the burden of demonstrating by substantial evidence that any violation of Song-Beverly by BMW was wilful; that is, that BMW did not have a good faith and reasonable belief that the facts imposing the statutory obligation were not present. (AOB 42-43.)

BMW has illustrated in its opening brief that Respondent's own testimony demonstrates that the brake problems were repaired. (AOB 43; RT 60-61.) Further, she admitted on the stand that she did not know whether BMW's alleged brake defect related to the rotors or brake pads.(AOB 43; RT 142.) Respondent's testimony indicates that BMW was reasonable in believing Song-Beverly's replace or reimburse provisions were not applicable. There simply was not enough evidence to support the argument that BMW wilfully failed to replace Respondent's vehicle.

Respondent claims in her brief that BMW knew a substantial defect existed which had not been repaired and, therefore, knew that it was required to buy back the car. (RB 24.) She places great emphasis on the fact that BMW did not buy back Respondent's car, claiming that she was only offered a trade assist deal. (RB 24.)

BMW was reasonable in believing that it did not have an obligation to repair or reimburse. The evidence cited above is illustrative. BMW would have bought back Respondent's car if the facts had supported the applicability of Song-Beverly. (RT 312, 356-357, 391.) **Mr. Butler** testified that he has no problem exploring all available options with a dissatisfied customer. (RT 393-394.)

Respondent is incorrect in her assertion that BMW only offered trade assistance as a solution. (RB 24-25.) In fact, as a matter of customer good will, and in spite of the fact that BMW was certain it had no obligations under Song-Beverly, BMW's representatives offered to replace all of the brake components and put a new set of tires on the car. (RT 356, 424.)

Respondent asserts without citation to the record that BMW had a corporate policy of only offering repairs or trade assistance for defective cars. (RB 10-11,

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25.) She fails to show the existence of such a corporate policy. In fact, when her counsel asked **Mr. Butler** about such a corporate policy, he unequivocally said that BMW did not have such a policy. (RT 382.) **Mr. Butler** testified that he would not have hesitated to authorize a buy back or replacement if the situation warranted it. (RT 391.)

BMW had no written policy on repurchase and replacement of its vehicles at the end of 1991. (RT 388.) Respondent argues that a trier of fact may consider this fact in determining wilfulness. (RB 25.) However, this evidence alone cannot possibly be considered substantial. At most, it is one factor--a scintilla of evidence--for consideration by the jury. (See, Estate of Teed (1952) 112 Cal.App.2d 638, 644.) Thus, the fact that BMW did not have a written policy for replacement or reimbursement of vehicles is not enough for Respondent to claim she presented substantial evidence of BMW's wilful violation of Song-Beverly.

Last, Respondent erroneously asserts that BMW has cited no support for its argument that BMW reasonably and in good faith believed they had no further obligations under Song-Beverly. (RB 26.) As this court is no doubt aware, BMW points to detailed evidence demonstrating this good faith belief. (AOB 44-45.) Testimony by Messrs. Hanggi, Kanae, Butler, Hearty and Barron all supported BMW's contention that it did not believe Song-Beverly applied. Therefore, based on the Kwan standard, BMW had a good faith and reasonable belief that the facts imposing the statutory obligation were not present. (See, Kwan v. Mercedes-Benz of North America, Inc. (1994) 23 Cal.App.4th 174, 185.) Respondent did not present substantial evidence to refute this proposition.

C. THE CIVIL PENALTY IS BARRED BY THE ONE YEAR LIMITATIONS PERIOD OF CODE OF CIVIL PROCEDURE SECTION 340(1)

The civil penalty is barred by the one year limitations period of Code of Civil Procedure section 340(1) since Respondent did not bring her claim for at least eighteen months after she discovered what she believes to have been a breach by BMW of the express warranty on her vehicle. (AOB 40-42.)

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Respondent first claims that BMW is barred from raising the statute of limitations argument because it did not specify section 340(1) in its answer to the complaint. (RB 26.) BMW made it clear in its answer that it was raising each and every applicable statute of limitations as an affirmative defense. (CT 33.) Thus, lateness in commencing the action was urged as an affirmative defense.

Respondent next claims that BMW waived its defense by not raising the issue at trial. (RB 26.) Generally, failure to raise a point in the trial court constitutes a waiver and the appellant is estopped from raising that point on appeal. (Redevelopment Agency v. City of Berkeley (1978) 80 Cal.App.3d 158, 167.) An exception to the rule applies when "the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence." (Id.) Here, the issue of the statute of limitations involves uncontroverted facts which could not be altered by the presentation of additional evidence.

As BMW has pointed out, Respondent testified that she called BMW at least twice and sent BMW a letter in mid-1990. (AOB 41-42; RT 62-64.) She told BMW then that she would want "to exercise other options" if her brakes "were not repaired properly" at that time. (AOB 42; RT 64.) Respondent has not disputed these facts in her brief. Also, Respondent testified that she explained her frustration with repair attempts to BMW's representatives in October 1990. (AOB 42; RT 68.) Again, Respondent does not dispute this fact. Therefore, it is undisputed that Respondent knew she had discovered what she thought was a defect no later than October 4, 1990. Further, it is undisputed that Respondent filed suit on April 10, 1992. The presentation of additional evidence would have no effect on these facts. (See, Redevelopment Agency v. City of Berkeley, 80 Cal.App.3d at 167.)

Respondent's argument that the statute of limitations is a matter of fact, therefore, is incorrect. This court may decide the legal question of the appropriate limitations period for the Song-Beverly civil penalty.

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The last argument raised by Respondent in opposition to BMW's statute of limitations defense is that a four-year limitations period applies to Song-Beverly actions. (RB 27.) Her argument is unconvincing.

An action on a penalty or forfeiture carries a statute of limitations period of one year unless a different limitation period is prescribed by statute. (Cal. Code Civ. Proc. § 340(1).) "The settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature, and thus governed by the one-year period of limitations . . . ." (G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 277 (citations omitted).)[13/]

In G.H.I.I., the compensatory damages and treble damages were contained in separate statutes of the same Act. (G.H.I.I. v. MTS, Inc., 147 Cal.App.3d at 279.) Song-Beverly is similar in that it provides for both actual damages and a civil penalty in separate subdivisions of the same statute. Therefore, Song-Beverly's civil penalty provision (section 1794(c)) is severable from the actual damages provision (section 1794(a)) for purposes of the statute of limitations.[14/] The civil penalty should be governed by the one-year limitations period found in California Code of Civil Procedure section 340(1).

Moreover, the California legislature has specifically chosen to refer to the double damages provision of section 1794(c) as a "civil penalty." Song-Beverly was amended in 1987 to add the civil penalty provision. (Act of Sept. 28, 1987, ch. 1280, § 4, 1987 Cal.Stat. 4563.) Following accepted methods of statutory construction, it is apparent

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[13/] Respondent cites Menefee v. Ostawari ((1991) 228 Cal.App.3d 239) for the proposition that section 340(1) only applies where the penalty is mandatory. The Menefee court relies on Holland v. Nelson. ((1970) 5 Cal.App.3d 308.) Menefee and Holland are distinguishable in that the additional damages provisions of the statutes involved therein were part of the actual damages provisions and were not severable.

[14/] Cf., Holland and Menefee where the statute combines the right to actual and additional damages in the same sentence and cannot be severed.

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that the legislature meant for section 1794(c) to be a penalty.[15/] As such, the one-year limitations period applicable to penalties applies to Song-Beverly's civil penalty. (Cal. Code Civ. Proc. § 340(1).)

Finally, such a holding is not contrary to the decision in Krieger v. Nick Alexander Imports, Inc. ((1991) 234 Cal.App.3d 205, 218) that the four-year limitations period of Commercial Code section 1790.3 is applied to actions for actual damages under Song-Beverly. Since Krieger did not discuss whether Song-Beverly's civil penalty provision was subject to a different limitations period it provides no authority on that point. (Ginns v. Savage (1964) 61 Cal.2d 520, 524.). Further, it is unlikely that the limitations period for breach of warranty provided by the Commercial Code has any application to Song-Beverly's civil penalty since the Commercial Code does not provide for penal damages (Cal. Com. Code § 1106; Krieger v. Nick Alexander Imports, Inc.. 234 Cal.App.3d at 212.)

Respondent's claim for a civil penalty was in fact barred by the statute of limitations and reversal is appropriate.

D. THE SPECIAL VERDICT FORM WAS DEFECTIVE

The jury in the underlying case was presented with a defective special verdict form which never asked them to decide whether BMW was liable under Song-Beverly. Instead, the jury was simply asked to decide the amount of damages to be awarded to Respondent. (AOB 26-27.) As such, the verdict is ambiguous, hopelessly inconsistent or incomprehensible and reversal is required. (See, Woodcock v. Fontana

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[15/] Where the words of a statute are clear, the court should not add to or alter them to accomplish a purpose which does not appear on the face of the statute or from its legislative history. (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.) "Where the Legislature uses different language in similar statutory provisions, it is presumed it did so advertently and had a different legislative intent with regard to each provision. Moreover, every word or phrase used in a statute must be given meaning and effect." (Interinsurance Exchange v. Spectrum Investment Corp. (1989) 209 Cal.App.3d 1243, 1258 (citations omitted).) "In general, 'a substantial change in the language of a statute . . . by an amendment indicates an intention to change its meaning'. It is presumed changes in wording and phraseology were deliberately made and that different meanings were intended when different words were used." (Oldham v. Kizer (1991) 235 Cal.App.3d 1046, 1059 (citations omitted).)

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Scaffolding & Equipment Co. (1968) 69 Cal.2d 452, 457; Mixon v. Riverview Hospital (1967) 254 Cal.App.2d 364, 375.)

Respondent argues that BMW should not prevail on this argument for several reasons. First, she argues that BMW stipulated to the form of the verdict and cannot now object to it. (RB 27.) Respondent cites to the Reporter's Transcript for authority, but it is clear from the cited page that even the Honorable Judge Couzens was not entirely certain whether the form of the verdict had been the subject of stipulation by the parties.[16/] In fact, BMW did not stipulate to the form of the verdict; rather, it believed there would be an initial question to establish liability under Song-Beverly. (RT 693.)[17/] No "stipulation" to the verdict form appears in the record; none was reached.

Second, Respondent asserts that BMW cannot prevail because it failed to raise an objection before the jury was discharged. (RB 27.) This is not the case.

Generally an objection to the meaning of a verdict need not be made before the jury has been discharged when the failure to object was not the result of a desire to reap a technical advantage or engage in a litigious strategy. (Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal.2d 452, 456-57 n.2; See also, Phipps v. Superior Court (1939) 32 Cal.App.2d 371, 374-75 (finding no waiver of the right to

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[16/] At the hearing regarding Appellant's motions for JNOV and New Trial, Judge Couzens stated:

> "My recollection is that I reviewed the verdict form with counsel and that the verdict from represented a consensus and opinion between counsel and the Court regarding the form of the verdict. That's my recollection. I could be in error, but that's my recollection."

(RT 696 (emphasis added).)

[17/] BMW's proposed special verdict form contained twenty-three questions, with several initial questions geared toward determining whether there was liability under Song-Beverly. (CT 255-264.) Respondent submitted a proposed verdict form which began with: "What amount in damages, if any, should the defendants pay plaintiff?" (CT 697-698.) As a compromise, the lower court determined that it would accept defendants' Question No. 16 concerning damages, rather than the formulation urged by Respondent. (CT 129-130.) BMW believed the court also determined that the form would begin with the question: "Did defendant violate the Song-Beverly Warranty Act?"

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complain on appeal despite the lack of objection before the jury was discharged); Dauhenhauser v. Sullivan (1963) 215 Cal.App.2d, 231, 235-36 (raising the question of a defective verdict after the jury was discharged and determining appellant had no litigious strategy in not raising an objection); Mixon v. Riverview Hospital (1967) 254 Cal.App.2d 364, 376-77 (reversing the lower court judgment although the objection to the verdict was made in a motion for new trial).)

The fact that BMW did not object to the verdict before the jury was discharged was not because of any litigious strategy. In fact, BMW never had an opportunity to see the special verdict form before the jury returned its verdict. BMW only became aware of the defective nature of the verdict as it was being read in court because the trial judge had asked court staff to type the form and he never showed it to counsel. At this point, it was too late for BMW to object to the nature of the form. Having deliberated and reached a verdict, the jury could not realistically have been asked to return for further deliberations to then decide if there was any liability in the first place. The jury had conducted its entire deliberations on a misleading special verdict form; the damage was already done.

Third, Respondent argues that BMW waived its right to object to the special verdict by failing to explain any ambiguity or potential confusion during closing arguments. (RB 27.) BMW has already explained to this court that it had no knowledge of the actual form until it was read to the jury. (See, *supra*.) During closing arguments, BMW was under the assumption that the special verdict form began with a question asking the jury whether BMW had violated Song-Beverly. BMW had no opportunity to explain any ambiguity or potential confusion because it did not know it existed.

Bly-Magee v. Budget Rent-A-Car Corp. ((1994) 24 Cal.App.4th 318) is distinguishable. There, the trial court refused Budget's proposed special verdict form. (Bly-Magee v. Budget Rent-A-Car Corp., 24 Cal.App.4th at 325.) Budget knew its verdict form had been rejected and that it would need to argue those issues in closing argument. (Id. at 326.) The court found that Budget "had every opportunity to focus the jury on this

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issue but chose not to do so." (Id.) Clearly, BMW did not know that the jury would not be asked to decide BMW's liability. BMW did not have an opportunity to focus the jury specifically on the issue in its closing argument. It would be unreasonable to hold that BMW waived its right to object to the special verdict form for this reason.

Fourth, Respondent argues that, in any event, the special verdict form was proper. (RB 27-28.) She disputes BMW's claim that the form was fatally incomplete in that it failed to submit the issue of BMW's liability under Song-Beverly to the jury for resolution. (AOB 26-27.) As presented to the jury, the form in effect instructed them to first assume that BMW was liable. Based on this assumption, the jury was then asked to determine damages and to determine whether BMW wilfully violated the statute. Respondent argues that the jury could have written $0 for damages and that this would have indicated that Song-Beverly was not violated. She is wrong.[18/] The jury could have assumed that BMW had violated Song-Beverly but that no damages were incurred. Damages are a separate issue from liability.

California Code of Civil Procedure section 624 provides that when a special verdict is used, the jury must resolve all of the ultimate facts presented to it in the special verdict so that "... nothing shall remain to the court but to draw from them conclusions of law." (Cal. Code. Civ. Proc. § 624.)[19/] The jury simply was never asked to determine whether BMW had violated Song-Beverly. All ultimate facts were not resolved.

[18/] Respondent also is wrong in her characterization of the statement made by BMW's attorney during argument before the judge. (RB 28.) Counsel for BMW never admitted that a $0 entry by the jury would indicate no liability. In fact, Mr. Nanjo said: "A jury could have answered no damages, but found liability." (RT 693.)

[19/] Respondent cites section 625 for the proposition that a special verdict may be submitted on less than all of the issues. (RB 28.) She cites no case law interpreting the statute as she suggests. Such an interpretation would contradict the express language of section 624. Further, the California Supreme Court has said: "A special verdict form is incomplete if it asks the jury to answer only some of the issues presented by the evidence, and if there is no general verdict." (Montgomery v. Sayre (1891) 91 Cal. 206, 210.)

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Falls v. Superior Court ((1987) 194 Cal.App.3d 851, hearing denied, 11/18/87) is on point. In Falls the jury determined that defendant was negligent and that this negligence was a proximate cause of injury to the plaintiff. (Id. at 854.) The jury became hopelessly deadlocked on the issue of damages and returned the verdict form without answering the question which apportioned negligence. (Id.) Plaintiff asked the court to enter partial judgment on the issues of negligence and proximate cause. The court refused. The court of appeal agreed and noted that, "the finding of the jury was not dispositive of the liability issue . . . ." (Id. at 855.)

Here, too, the finding of the jury was not dispositive of the liability issue. Just as the jury in Falls never considered the issue of apportionment of fault, this jury never considered the issue of BMW's ultimate liability under Song-Beverly. The jury never resolved the issue of liability in Respondent's favor.[20/]

Because the verdict form is fatally incomplete, confusing, and vague, this error is prejudicial to BMW. Reversal is proper.

E. THE CIVIL PENALTY INSTRUCTION WAS ERRONEOUS

The trial judge inadvertently failed to instruct the jury on a key element of BMW's defense regarding whether it reasonably believed that the car conformed to the applicable express warranty and that there were no unresolved problems with the vehicle. (AOB 29-30.) BMW was entitled to have the jury weigh the evidence in accordance with appropriate instructions. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 543.) The error was apt to mislead the jury and likely became a factor in its verdict. It was prejudicial error for the trial court to fail to instruct on BMW's theory of the case which was supported by substantial evidence. (Williams v. Carl Karcher Enterprises, Inc. (1986) 182 Cal.App.3d 479, 490, hearing denied, 9/10/86.)

[20/] Contreras v. Goldrich ((1992) 10 Cal.App.4th 1431), cited by Respondent, is distinguishable. In Contreras the jury had resolved the issue of liability in respondent's favor. (Id. at 1434.) Liability was never reached in this matter.

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BMW illustrates in its brief that evidence was presented on the issue addressed by the omitted instruction. (AOB 30:7-13.) Experts on both sides of the case agreed that reasonable repairs were made on Respondent's vehicle. (AOB 30:8-9; RT 230, 510, 512, 524, 525, 531.) Even Respondent herself testified that the problem would disappear after each repair, usually for several months. (AOB 30:11-12; RT 72, 133, 144.)

Nonetheless, Respondent argues that the error was not prejudicial and that BMW has waived its opportunity to make this instruction argument on appeal. (RB 29-30.) It is no answer, however, to assert that because the judge suggested to the jury that it could read one of fifty-three pages of jury instructions BMW was no longer entitled to have an instruction read to the jury on a fundamental aspect of its defense. It is clear from the record that the instruction was not read. (RT 671.) BMW attempted to have the judge read the instruction, but he refused. (RT 671.) BMW was prejudiced by this error and is entitled to reversal.

Respondent also attempts to make an argument that the omitted instruction was not part of BMW's defense. (RT 29-30.) In support of this view, Respondent selectively quotes the closing argument of BMW's attorney. (RB 29-30 n.94.) The quotations, however, do not support her contention that BMW did not argue that it reasonably believed that the vehicle conformed to the express warranty and that there were no unresolved problems. If anything, the quotations support BMW's arguments in that they demonstrate that BMW had no reason to think it was in violation of Song-Beverly. Further, closing argument showed: that BMW did not believe it was responsible for the problems in Respondent's vehicle (RT 629:12); that BMW responded to her complaints and performed adequate repairs (RT 633:11-12); and that there was no non-conformity and no defect. (RT 644:16.) Thus, it is clear that the jury was made aware that BMW had a reasonable belief that it was not violating Song-Beverly and could not have been acting in wilful violation of the statute.

This error by the lower court was prejudicial since BMW's theory was supported by substantial evidence. Reversal is warranted.

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F. RESPONDENT HAS FAILED TO REBUT BMW'S ARGUMENT THAT IT WAS PREJUDICED BY THE COURT'S IMPROPER REFUSAL TO INSTRUCT THE JURY ON WARRANTY RIGHTS OF LESSEES OF USED VEHICLES LEASED BY A DEALER WITH THE BALANCE OF A MANUFACTURER'S NEW CAR WARRANTY

In its opening brief, BMW argues that the court improperly rejected a critical instruction regarding the warranty rights of lessees of used vehicles leased by a dealer with the balance of a manufacturer's new car warranty. (AOB 30-31.) This instruction would have correctly informed the jury that a manufacturer cannot be held liable under Song-Beverly unless it is first established that the consumer had leased a new motor vehicle. Ample evidence was introduced to indicate that Respondent had leased a used car. The jury's verdict was wholly dependent upon whether or not Respondent's car was a "new motor vehicle." It is likely that a result more favorable to BMW would have been reached if the instruction had been given to the jury.

Respondent has failed to address this issue in her brief.

G. BMW'S INSTRUCTION ON THE BURDEN OF PROOF WAS IMPROPERLY REJECTED

The trial court refused BMW's proposed instruction regarding the burden of proof and preponderance of evidence for a cause of action for breach of an express warranty for a new motor vehicle. (RT 667-668; CT 172.) The instruction given by the court was overgeneralized and inaccurate for several reasons. (AOB 31-32.) First, it failed to mention Respondent's burden to prove first by a preponderance of the evidence that she was the lessee of a "new motor vehicle." (AOB 31.)

Second, the instruction indicated that Respondent only was required to notify the manufacturer of a breach of warranty. It did not indicate that she must first prove that the manufacturer had actually breached the express warranty by failing to conform the car to the applicable express warranty after a reasonable number of repair attempts. (AOB 31-32.)

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Third, the instruction given made no mention of the obvious requirement that any breach of warranty must have occurred within the applicable warranty period. Respondent fails to provide authority for her contention that the law does not require that the breach take place within the warranty period. (RB 31.) Section 1795.6 may extend the warranty for defects not fixed within the warranty period, but it does not obviate the essential requirement that breach must have occurred within the applicable warranty period. (See, Cal. Civ. Code § 1795.6.)

Respondent is incorrect in her assertion that BMW stipulated to the burden of proof instruction given by the court. (RB 30.) No such stipulation appears in the record. It is clear from the record that BMW's counsel indicated that BMW was dissatisfied with the refusal of a number of instructions regarding the Song-Beverly provisions relating to new or used vehicles. (RT 542:2-8.) The burden of proof instruction obviously would fit within this category of instructions. BMW did not stipulate to the instruction as given.

Elements not covered in the instruction that was given were important to the defense in that they must be evaluated and found by the jury to be facts before BMW can be found liable under Song-Beverly for breach of an express warranty. BMW presented substantial evidence to corroborate its theory that it did not breach an alleged applicable express warranty. (AOB at Section IV.) The jury should have been presented appropriate, accurate instructions to aid it in evaluating this evidence. Failure to properly instruct the jury was prejudicial and mandates reversal.

H. USE OF THE TERM "LEMON LAW" PREJUDICED THE JURY

The lower court granted BMW's *in limine* motion prohibiting the use of the term "lemon law" or "lemon" in describing the litigation or Respondent's vehicle. (AOB 46; RT 3; CT 56-57, 114.) BMW had made the motion to prevent BMW from being prejudiced by the use of these argumentative and inflammatory terms. (AOB 47; See, Cal.

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Evid. Code § 352.) In spite of the court's order, Respondent's attorney used the term fourteen times in direct examination, cross examination and closing argument.[21/]

Once Respondent and her attorney had violated the court's order the damage had been done. The entire purpose for seeking the *in limine* motion restricting the use of the prejudicial term was frustrated. (AOB 47.) Objecting at that point would have been futile. Under the reasoning of the California Supreme Court in People v. Morris ((1991) 53 Cal.3d 152), BMW's motion *in limine* was a sufficient manifestation of objection to protect the record on appeal. (AOB 46-47.) Respondent's assertion that BMW waived its objection is incorrect. (RB 31.)

Respondent argues that the court later found she and her counsel had not violated the court's admonition. (RB 31.) Nonetheless, it is clear that even if the court had permitted Respondent to use the term once, fourteen times clearly violated the order. The lower court was incorrect in its assessment that BMW was not prejudiced. The purpose of the *in limine* motion granted by the court had clearly been violated. BMW was prejudiced and reversal is appropriate.

I. THE JUDGMENT SHOULD BE REVERSED IN ITS ENTIRETY NOTWITHSTANDING RESPONDENT'S THEORY THAT THE JURY, AS INSTRUCTED AT TRIAL, INSTEAD COULD HAVE FOUND LIABILITY UNDER THE FEDERAL MAGNUSON-MOSS WARRANTY ACT

Respondent contends that the underlying judgment, with the exception of the civil penalty portion of the judgment, should be affirmed by this court on the basis that the jury, as instructed herein, could have found liability under the federal Magnuson-Moss Warranty Act (hereinafter referred to as "MMA") if this case had been tried solely under the statutory provisions of the MMA. (RB 33-34.) This contention is not only wholly untenable inasmuch as it represents an attempt to raise a new theory of potential

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[21/] In her brief, Respondent argues that counsel's use of the term "lemon law" was "inadvertent." (RB 31.) Webster's dictionary defines "inadvertent" as: "not duly attentive; unintentional; accidental." (Webster's II: New Riverside University Dictionary, 96 (1988, Riverside Publishing Co.).)Respondent cannot possibly claim with a straight face that use of the banned term on fourteen occasions constitutes conduct which is within this definition.

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liability for the first time on appeal which was not fairly presented to either the jury or BMW at trial, but is based purely on speculation and conjecture.

It is a well-settled elemental appellate principle that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his or her position and adopt a new theory on appeal, particularly when a party does not reasonably inform the jury about such a theory either through argument or instruction. To permit a party to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. (Richmond v. Dart Industries, Inc. (1987) 196 Cal.App.3d 869, 874-880, hearing denied, 2/3/88; Planned Protective Services, Inc. v. Gorton (1988) 200 Cal.App.3d 1, 12-13; Marsango v. Automobile Club of So. Cal. (1969) 1 Cal.App.3d 688, 694-695; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 427 n.2020; CNA Casualty of California v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598, 618 n.10.) As a corollary principle, it is similarly well-settled that when the parties assume at trial the applicability of a particular statute, a party should be barred on appeal from raising the applicability of a different statute when the party does not reasonably inform the trier of fact and the party's opponent about such a statutory theory either through his papers, argument or instruction. (Planned Protective Services, Inc. v. Gorton, 200 Cal.App.3d at 12-13; Sommer v. Martin (1921) 55 Cal.App. 603.)

While it is true that an appellate court in its discretion may consider a new theory of the case on appeal as a question of law where the facts underlying such a theory were clearly put at issue at trial and are undisputed on appeal, if the new theory raised on appeal contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial, the opposing party should not be required to defend against it on appeal. (Richmond v. Dart Industries, Inc., 196 Cal.App.3d at 879; Marsango v. Automobile Club of So. Cal., 1 Cal.App.3d at 694-695; Panopulos v. Maderis (1956) 47 Cal.2d 337, 341; Design Associates, Inc. v. Welch (1964) 224 Cal.App.2d 165, 172.) Even assuming a new theory on appeal can be framed as a question of law based

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upon undisputed facts presented at trial, an appellate court should decline to entertain any such new theory on the policy ground that the party proffering such a new theory "... ought not to have two trials where they could have had but one," even if consideration of the new theory would not actually require a new trial. (Richmond v. Dart Industries, Inc., 196 Cal.App.3d at 879; see also, CNA Casualty of California v. Seaboard Surety Co., 176 Cal.App.3d at 618 (suggesting that an appellate court may in its discretion consider an issue not properly raised in the trial court if the issue presents a pure question of law on undisputed evidence in limited situations "... regarding either a noncurable defect of substance, such as a lack of jurisdiction or complete failure to state a cause of action, or a matter affecting the public interest or the due administration of justice.")

The rationale underlying these foregoing principles has been synthesized thusly by several California Appellate courts:

> "The general rule is stated by Witkin: 'Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 316, p. 327.) Witkin noted the doctrine is a well-established rule of appellate practice, based on the notion a change of position on appeal from the 'theory of trial' is unfair to the trial court and unjust to the opposing party, and is justified as an invocation of the invited error doctrine and implied waiver in the trial court by the appellant of the new theory. (9 Witkin, Cal. Procedure, op. cit. supra.)" (Planned Protective Services, Inc. v. Gorton, 200 Cal.App.3d at 12-13.)

> "Litigation is an adversary process contemplating an element of risk to all parties. To permit a change of theory on appeal is to allow one party to deal himself a hole card to be disclosed only if he loses. Even if that device does no more than give him a second chance, it has unbalanced the inherent risk of the litigation and put the other party at a disadvantage. Such a process is to be allowed if at all under unusual circumstances - as for example where the question is purely one of law so that it cannot be said that the balance of litigation risk was altered by the failure to raise it at trial." (Marsango v. Automobile Club of So. Cal., 1 Cal.App.3d at 695.)

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Further, the Third District has proffered the following observations with regard to the above-stated principles of appellate practice which merit thorough explication:

> [I]n a jury trial it is the duty of the jury to determine the true facts from the evidence and to apply the rules of law set forth in the jury instructions to the true facts to arrive at a verdict. (See, Code Civ. Proc. § 608; Henderson v. Los Angeles Traction Co. (1907) 150 Cal. 689, 696-697 [89 P. 976]; Gipson v. Davis Realty Co. (1963) 215 Cal.App.2d 190, 202 [30 Cal.Rptr. 253]; Bowen v. Sierra Lumber Co. (1906) 3 Cal.App. 312, 324-325 [84 P. 1010]; cf. CALJIC No. 100 (1979 rev.).)
>
> . . .
>
> However, we do not believe a lay jury could be reasonably expected to ferret out a plaintiffs' theory of recovery unaided by argument. Given the magnitude of the trial, we think plaintiffs had an obligation reasonably to inform the jury in argument about its current theory of the case by identifying the evidence upon which it relied and by connecting that evidence to a theory of liability tendered in the instructions. 'The importance of the closing argument increases in almost a direct ration with the length of the trial and the amount of controversy over the facts. Although the importance of certain testimony may be obvious to an attorney, it does not follow that it will be obvious to the jury. Especially in long and complicated cases, the nuggets of important facts may, to the layman juror, remain buried in the sands of trivial and conflicting testimony. It is the closing argument that must collect the important facts and expose them to the view of the jury in a logical and unified pattern that they will want to accept and believe. [¶] No less important than clarifying the facts of the case is the clarification of the issues. Even though in counsel's opening statement he may have clearly spelled out the issues in the case, by the time of the closing argument, there may be jurors who either misunderstand the issues or simply do not remember the issues at all. As the closing arguments will be one of the last things the jury hears before retiring to consider their verdict, clear restatement of the issues in their simplest terms can make a lasting impression on the jury. Likewise, counsel's comments and relation of the testimony to the judge's instructions to the jury, or in a jurisdiction where his instructions follow closing argument, his anticipated instructions, may have a major effect on the jurors. [Citations omitted.]
>
> . . .
>
> Plaintiffs did not reasonably inform the jury about the theory now asserted on appeal. As we have noted, no mention of the theory was made in plaintiffs' opening statement. Nor was the

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> theory argued with reasonable clarity in plaintiffs' closing argument.
>
> . . .
>
> It is evident plaintiffs never argued their current theory to the jury in a way that reasonably informed the jury of the theory.
>
> . . .
>
> We dare say it takes no citation of authority to recognize that California's trial courts are limited public resources subject to overwhelming demand. Plaintiffs occupied a superior court trial for over four months. Having failed to tender their . . . [new] theory [on appeal] with reasonable clarity to the jury, plaintiffs waived the theory and may not try the case anew. Plaintiffs fairly had their chance.

(Richmond v. Dart Industries, Inc., 196 Cal.App.3d at 877-880.)

In the present matter, although it is true that Respondent did not explicitly dismiss her MMA statutory cause of action at or before trial, it is patently clear from the record on appeal and likewise from her counsel's overt conduct detailed therein that Respondent waived her MMA cause of action insofar as the entire theory of her case was premised upon a statutory violation of the Song-Beverly Consumer Warranty Act, and not the MMA. This is evident not only from the substantive content of her counsel's opening and closing arguments to the jury, but in the substantive content of the jury instructions themselves.

For example, in her counsel's opening statement, counsel stated as follows in relevant part:

> "And what we're saying here is that there's been a violation of the Song-Beverly Consumer Warranty Act, because the Court will instruct you at the end, but there are certain circumstances." (RT 31:19-23.)
>
> "Part of our claim is part of our damage claim is the approximate amount of thirteen thousand so she can pay off this leasing company and get cleared of that.
>
> "Secondly, the Song-Beverly Act provides in case its terms are met she's entitled to get back her lease payments and what she paid down on the lease. Okay?" (RT 32:22-28.)
>
> "Okay. Then finally, then I will conclude, there's a claim for what's called a civil penalty.

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"We have to prove what's called a willful breach of warranty.

"And the Court will instruct you on what that means." (RT 33:7-11.)

Similarly, her counsel's closing statement is replete with exclusive references to Song-Beverly indicating that this case was in fact presented to the jury solely under the Song-Beverly Consumer Warranty Act:

"Ladies and gentlemen, let me start by summing up the evidence proving a breach of warranty, a violation of the Lemon Law, because that's what we're talking about first and foremost." (RT 606:10-13.)

. . .

"Okay. So what are the elements.

"First of all, you remember there was a lot of testimony not a lot, there was testimony about is this a new car, a used car, a demonstrator, all that business?

"Well, the Court's going to take care of that and instruct you all that this car sold with the balance of a manufacturer's warranty is covered by the Song-Beverly Consumer Warranty Act. It is under this Lemon Law." (RT 606:24-607:7.)

"And there are some extra civil penalties that should be awarded. I'll tell you why.

"And I am going to start with asking you to pay particular attention to a jury instruction which I am going to put on the transparency. The Court will read this to you.

"Okay. No let's go to this.

"This is what I call the heart of the Song-Beverly Consumer Warranty Act, the California Lemon Law. This is the heart of it. This is the main thing." (RT 619:17-24.)

"My point is, this trade assist was not in compliance with the Song-Beverly Act. It wasn't a replacement. And it wasn't her money back." (RT 623:10-12.)

Finally, the substantive and particularized content of the jury instructions read to, and presumably considered by, the jury, when considered in total, indicate that the entire theory of Respondent's case was premised upon a statutory violation of the

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Song-Beverly Consumer Warranty Act, and not the MMA. [22/] (See, e.g., CT 153, RT 660: 12-17 ("Lessee's Warranty Rights"); CT 156, RT 661:4-6 (Extension of Warranty Period under Song-Beverly); CT 164, RT 663:6-14 ("Incidental Damages"); CT 165, RT 663:15-664:11 ("Plaintiff's Damage Claims"); CT 166-167, RT 664:12-665:15 (Effect of Continued Use of Vehicle); CT 168, RT 665:16-666:23 ("Manufacturer's Duty to Replace or Reimburse"); CT 172, RT 667:16-668:4 ("Burden of Proof and Preponderance of the Evidence - Express Warranty"); and CT 174-175, RT 668:21-671:22 ("Civil Penalty as to BMW of North America").)

In view of the foregoing, it is obvious that Respondent is attempting to revive a waived theory of potential liability for the first time on appeal which was not fairly presented to either the jury or BMW at trial. Such an attempt should not be received by this court on this appeal, and Respondent's contention in this regard should be summarily dismissed. (Richmond v. Dart Industries, Inc. (1987) 196 Cal.App.3d 869; Planned Protective Services, Inc. v. Gorton (1988) 200 Cal.App.3d 1; Marsango v. Automobile Club of So. Cal. (1969) 1 Cal.App.3d 688; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 427 n.20; CNA Casualty of California v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598, 618 n.10.)

As indicated above, while it is true that an appellate court in its discretion may consider a new theory of the case on appeal as a question of law where the facts

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[22/] In fact, in his prefatory remarks to the jury prior to instructing them, the trial judge stated:

> "THE COURT: All right. I am going to instruct you on the law at this point." (RT 652:20-21.)
>
> . . .
>
> "This is not an excuse, though, to tune out on me, though. I do want you to get a sense for the overall relationship of these instructions.
>
> "You are going to find that they have three main parts.
>
> "The first part is going to be amazingly similar to my pre-instruction to you, but just restated in the formal language.
>
> "There will be sort of a middle section that will define what breach of warranty is all about, the Song-Beverly Act, that sort of thing." (RT 653:3-13.)

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underlying such a theory were clearly put at issue at trial and are undisputed on appeal, if the new theory raised on appeal contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial, the opposing party should not be required to defend against it on appeal. In the present case, Respondent contends that the underlying judgment, with the exception of the civil penalty portion of the judgment, should be affirmed by this court on the basis that the jury, as instructed herein, could have found liability under the MMA if this case had been tried solely under the statutory provisions of the MMA. Apart from the unfounded speculation upon which this assertion is based, it is evident that Respondent's contention is based upon a misguided assumption that the facts adduced at trial surrounding BMW's potential liability under either Song-Beverly or the MMA are in fact undisputed.

As stated and evidenced elsewhere throughout the briefs submitted in connection with this appeal, the facts adduced at trial surrounding BMW's potential liability under Song-Beverly were disputed, therefore presenting no question of law upon which this court could consider Respondent's new theory of liability under the MMA. (Richmond v. Dart Industries, Inc., 196 Cal.App.3d at 879; Marsango v. Automobile Club of So. Cal., 1 Cal.App.3d at 694-695; Panopulos v. Maderis (1956) 47 Cal.2d 337, 341; Design Associates, Inc. v. Welch (1964) 224 Cal.App.2d 165, 172.)

Finally, according to Respondent's brief on appeal, it is apparent that Respondent's contention herein is also premised on the assumption that if this case had been tried solely on the basis of the MMA, the jury instructions would not have been significantly different. (RB 34.) This is an erroneous assumption inasmuch as even a simple comparison between several provisions of the Song-Beverly Consumer Warranty Act and the MMA reveal the fallacies of this premise.

While it may be true that the general purposes of both Song-Beverly and the MMA are similar, some significant differences exist between the two acts. For example, the Federal definition of "written warranty" is much broader than that found in Song-Beverly. (See, 15 U.S.C. §2301(6); cf., Cal. Civ. Code § 1791.2.) Second, in defining

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"consumer product," Magnuson-Moss uses a "normal use" test which is both broader and narrower than Song-Beverly's "buyer's primary purpose" test. (See, 15 U.S.C. §2301(1); cf., Cal. Civ. Code § 1791(a); see also, Comment, Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts, 26 UCLA Law Review 583, 652 (1979).) Third, a buyer may be better off seeking damages under Magnuson-Moss which allows full refunds, versus Song-Beverly which allows a depreciation deduction. (See, 15 U.S.C. §2301(12); cf., Cal. Civ. Code § 1793.2(d).) Based on these examples of differences between the two acts, it is clear that the jury instructions would not have been sufficiently similar to allow Respondent to prevail on an MMA theory without retrial.

The judgment should be reversed notwithstanding Respondent's theory that the MMA applied.

IV. CONCLUSION

For all of the reasons stated herein and in BMW's opening brief, BMW is entitled to have judgment entered in its favor and to have the jury's verdict reversed. In the alternative, this court should grant BMW a new trial.

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CROSS-RESPONDENT'S BRIEF

Appellant and Cross-Respondent BMW OF NORTH AMERICA, INC. (hereinafter referred to as "BMW") submits this brief in response to Respondent and Cross-Appellant LISA A. JENSEN's (hereinafter referred to as "JENSEN") cross-appeal relating to the trial court's denial of JENSEN's post-trial request for an award of expert witness fees.

V. QUESTIONS PRESENTED

In addition to the sole question presented in Cross-Appellant's Opening Brief, it is respectfully submitted that this court's attention should be focused on several other questions which directly bear upon the resolution of this cross-appeal. Those issues concern the proper standard of review on this cross-appeal, and whether or not in light of that standard reversal is warranted.

As will be discussed below, the order in question is reversible only for abuse of discretion.

Since the trial court's ruling was correct, it should be upheld.

VI. INTRODUCTION AND SUMMARY OF ARGUMENT

In view of the abbreviated length of Cross-Appellant's Opening Brief, and facile discussion, citation and analysis of the facts, procedural history, issues, and legal authorities referenced therein, it is evident that JENSEN's cross-appeal represents an open invitation to both this court and BMW to review the underlying record on this matter and essentially do her work for her. [23/] Such an invitation should neither be

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[23/] For example, JENSEN's "Statement of Facts and Procedural History" found at pages 34 through 35 of her Opening Brief is patently deficient on its face inasmuch as it represents an obvious attempt to incorporate necessary material facts and procedural history by vague reference to the underlying record on appeal in contravention of California Rule of Court, Appellate Rule 13 ("The opening brief shall contain a statement of the case setting forth concisely, but as fully as necessary for a proper consideration of the case, . . . the nature of the action or proceeding and the relief sought, a summary of the material facts, and the

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recognized nor countenanced by this court pursuant to California Rules of Court, Appellate Rule 18 indicating that defective briefs not complying with the requirements of the Appellate Rules of Court may, in the court's discretion, be returned for correction, stricken, or otherwise considered by the reviewing court.

Against this backdrop, according to Cross-Appellant's Opening Brief, it appears that JENSEN is asking this court to independently review, and subsequently reverse, the trial court's "ruling" relating to her post-trial request for expert witness fees in the amount of $2,527.00. JENSEN's asserted request for de novo review of the trial court's ruling is premised on her principal contention that the trial court's denial of these fees was made as a matter of law in accordance with the trial court's theory that Code of Civil Procedure section 1033.5 by its explicit terms does not allow for expert witness fees to be awarded in this case. However, it is not evident from Cross-Appellant's Opening Brief whether or not she is asking this court to actually award her previously requested expert witness fees in the amount of $2,527.00 or to remand this matter to the trial court for further consideration following this court's decision on this matter.

First, as discussed more fully below, it is not immediately apparent from the record on appeal that the trial court's denial of JENSEN's request for expert witness fees was in fact premised solely on a ruling as a matter of law that Code of Civil Procedure section 1033.5 by its explicit terms does not allow for expert witness fees. A plain and fair reading and analysis of the trial court record on this point demonstrates that the trial judge likely made his ruling on this matter principally in the exercise of the inherent

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judgment or ruling of the superior court.")

Further, JENSEN repeatedly makes reference to Civil Code section 1794(c) when the applicable statutory provision at issue herein is clearly Civil Code section 1794(d). (See page 34 ("Question Presented") and page 36 of Cross-Appellant's Opening Brief.) Finally, JENSEN makes specific reference in her notice of cross-appeal (Supplemental CT 1-2) that she is appealing from the trial court's order dated May 23, 1994, denying her expert witness fees, but has not even seen fit to make certain that this order is included in the record on appeal despite its obvious absence from the clerk's transcript on appeal.

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discretion afforded him under Civil Code section 1794 and Code of Civil Procedure section 1033.5. (See, Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal.App.4th 807, 813 (Despite mandatory language of Civil Code § 1794(d), Code of Civil Procedure § 1033.5(c) and Civil Code § 1794 vest the trial judge with discretion in connection with the awarding of attorneys' fees, costs, and expenses sought by a prevailing party in a Song-Beverly action.)

Accordingly, notwithstanding Cross-Appellant's contrary assertion, the appropriate standard of review on this appeal is the abuse of discretion standard. (Id; cf., Bussey v. Affleck (1990) 225 Cal.App.3d 1162, 1165.) Under this standard, it is well-established and universally recognized that the trial court is entitled to great deference in the exercise of its discretion. Here, JENSEN has simply not come forward with even a scintilla of evidence to demonstrate an abuse of the trial court's discretion in ruling against her with respect to her request for expert witness fees.

Second, assuming that JENSEN is correct in her contention that the trial court's ruling denying her request for expert witness fees is subject to independent de novo review on appeal as a matter of law, the authorities cited and discussed below analyzing and distinguishing JENSEN's cited authorities conclusively establish that the trial court did not err in ruling as a matter of law that Code of Civil Procedure section 1033.5 by its terms does not allow for expert witness fees to be awarded in this case.

Finally, assuming that JENSEN is correct in her contention that the trial court's ruling denying her request for expert witness fees is subject to independent de novo review on appeal as a matter of law, and this court likewise finds that the trial court erroneously concluded that Code of Civil Procedure section 1033.5 precludes an award of expert witness fees in this Song-Beverly action by its terms, this court should appropriately remand this matter to the trial court for further consideration since, as indicated above, it is ultimately within the trial court's discretion to grant or deny allowable costs under Code of Civil Procedure section 1033.5, even in a Song-Beverly case.

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VII. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

On March 23, 1994, a jury returned a verdict in this matter in JENSEN's favor totalling $88,053.00. Judgment was entered following the jury's verdict on or about April 5, 1994. (CT 466-471.)

Following the trial of this case, JENSEN filed her memorandum of costs seeking costs in the collective amount of $6,009.22 and attorneys' fees in the amount of $67,767.00, for an aggregate total of $73,776.22. (CT 382-388.) In conjunction with the filing of her memorandum of costs, JENSEN contemporaneously brought a motion for award of attorneys' fees, costs, and prejudgment interest, in which she sought prejudgment interest in the amount of $3,987.00 and expert witness fees in the amount of $2,527.00, in addition to the $73,776.22 mentioned above, for an aggregate grand total of $80,290.22. (CT 278-369, 444-465.)

This motion was timely opposed by BMW (CT 405-435), and BMW subsequently brought a related cross-motion to tax and/or strike the costs, attorneys' fees, and expenses sought by JENSEN as described above. (CT 472-629, 635-640.) This cross-motion was in turn timely opposed by Cross-Appellant. (CT 630-634.)

In her collective papers and related supporting declarations filed and served both as the moving and opposing party in connection with the above-described cross-motions, JENSEN supported her claim for expert witness fees, arguing that: (1) attorney's fees, expenses and costs were awardable pursuant to Civil Code section 1794(d) and Code of Civil Procedure section 1033.5; and (2) the expert fees were "expenses" under section 1794(d). (CT 358:5-8, 367:1-22, 451:15-452:2, 454:1-13.)

In its collective papers filed and served both as the moving and opposing party in connection with the above-described cross-motions, BMW sought to tax and/or strike JENSEN's request for expert witness fees in total on the alternative bases that: (1) JENSEN was not entitled to any requested costs in this matter, including expert witness fees, specifically prohibited by Code of Civil Procedure section 1033.5(b) absent

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affirmative proof proffered by JENSEN that in including the term "expenses" in Civil Code section 1794(d), the legislature intended that recovery of expert witness fees may be had under Code of Civil Procedure section 1033.5; and/or (2) JENSEN was not entitled to any costs, including expert witness fees, not affirmatively shown by JENSEN to have been reasonably incurred in connection with the commencement and prosecution of this action. (CT 425:21-428:10 [Cross-Respondent's Opposition to Cross-Appellant's Motion for Award of Attorneys' Fees, Expenses, Costs and Prejudgment Interest]; CT 489:1-16 [Cross-Respondent's Motion to Tax and/or Strike Costs, Attorneys' Fees and Expenses].)

Hearing on these cross-motions was held on or about April 27, 1994, and the trial court ruled as follows in pertinent part with respect to JENSEN's request for expert witness fees:

> THE COURT: This matter is on calendar as a result of a number of motions.
>
> I have reviewed the moving and responding papers in each case.
>
> . . . there are cross-motions regarding, or related motions regarding attorney's fees and costs. (RT 684:9-16.)
>
> . . .
>
> All right. Then just the motion for attorney's fees. Again, I read the attorney's fees and costs.
>
> I read the moving and opposing papers. You need not restate what is in the papers.
>
> I will just start with you, Mr. Anderson. Anything further you want to say?
>
> MR. ANDERSON: No, your Honor. (RT 684:28-685:7.)
>
> . . .
>
> THE COURT: All right. Then the Court will enter the following ruling:
>
> With respect to the request for expert witness fees, those are denied.
>
> There's been no explanation of the way around CCP section 1033.5.

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So that would bar expert fees in this situation, in any event. So those fees are denied. (RT 685:25-686:3.)[24/]

With respect to the other costs and fees sought by JENSEN, the trial court ruled that JENSEN was entitled to: (1) attorneys fees in the amount of $50,000.00 (RT 686:6-687:8; CT 641); (2) costs in the requested amount of $6,009.00 as reflected in JENSEN's cost bill (RT 687:6-8; CT 382-388); and prejudgment interest in the requested amount of $3,987.00 (RT 686:4-5; CT 641). In total, JENSEN was awarded $59,996.00 in costs, attorneys' fees, and prejudgment interest.

VIII. ARGUMENT

A. THE ABUSE OF DISCRETION STANDARD IS THE PROPER STANDARD OF REVIEW ON THIS CROSS-APPEAL

In her Opening Brief, JENSEN contends that the trial court denied her application for expert witness fees "... on the theory that these costs were not specified in Code of Civil Procedure section 1033.5." (AOB 34-35.) JENSEN then cites to Bussey v. Affleck ((1990) 225 Cal.App.3d 1162, 1165) in support of her related proposition that this court may "... independently review the trial court's refusal to award the expert witness fees [here] because the refusal was made as a matter of law." (AOB 35.) This proposition is incorrect as applied to this case.

In Bussey v. Affleck, the plaintiffs prevailed in an action for the balance due on a promissory note. The contract in issue apparently provided for the payment of costs and reasonable attorneys' fees to the prevailing party. Following trial, the prevailing plaintiffs made a post-trial motion seeking their counsel's expenses and disbursements in

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[24/] In addition, with respect to Cross-Appellant's request for expert witness fees, the trial court's minute order of this date states as follows: "Defense [sic] motion as to expert witness fees: denied." (CT 641.)

As indicated above, although JENSEN states in her notice of cross-appeal (Supplemental CT 1-2) that she is appealing from the trial court's order dated May 23, 1994, denying her expert witness fees, this order is not included in the record on appeal and the appeal should be considered procedurally defective on that ground.

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the amount of $11,103.41, including a request for expert witness fees in the amount of $8,283.00. (Bussey v. Affleck, 225 Cal.App.3d at 1164.) Plaintiffs "... claimed these expenses and disbursements as 'attorney fees' under Code of Civil Procedure section 1033.5 ..., subdivision (a)(10), based on defendants' agreement under the note 'to pay all costs and expenses of collection including reasonable attorneys fees.'" (Id.)

In their memorandum in opposition to the plaintiffs' motion, the losing defendants itemized the plaintiffs' requested expenses and disbursements, and asserted that they were "'simply not recoverable pursuant to [section 1033.5].'" (Id. at 1165.) Specifically, with respect to the plaintiffs' request for expert witness fees, the defendants argued that "... expert witness fees, ... could not be awarded under subdivision[] (b)(1) [of section 1033.5] ...." (Id.)

The trial court denied the plaintiffs' post-trial motion and entered a postjudgment order awarding the plaintiffs $200.00 of the $11,103.41 disbursed by their counsel in connection with the case as an arbitrary amount. Plaintiffs then appealed from the postjudgment order, contending that the trial court had erred when it declined to award all but $200.00 of the requested $11,103.41 disbursed by their counsel in connection with the case. (Id. at 1164-1165.)

In determining that the appropriate standard of review on appeal was the independent de novo review standard, the Bussey court reasoned that although an award of attorneys' fees is a matter within the sound discretion of the trial court and absent a manifest abuse of discretion the determination of the trial court will not be disturbed, given the context of the trial judge's ruling on this matter, specific reference in its memorandum of decision to the defendants' memorandum objecting to the allowance of these disbursements based on the language of Code of Civil Procedure section 1033.5, and the fact that the trial court disallowed virtually all of the disbursements the record on appeal indicated in total that the trial judge "... evidently determined that the counsels' disbursements could not be awarded as a matter of law ..." under Code of Civil Procedure section 1033.5(b). (Id. at 1165, n.8, 1166.)

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Applying the independent de novo appellate review standard, the Bussey court then concluded that since the contract in issue provided for payment of costs and attorneys' fees, the trial court could have allowed disbursements of counsel as attorneys' fees, including expert witness fees, under Code of Civil Procedure § 1033.5 subdivision (a)(10), notwithstanding the language of section 1033.5(b), if such disbursements represent expenses ordinarily billed to a client and are not included in the overhead component of counsel's hourly rate. (Id. at 1166-1167.) The Bussey court reversed the trial court's postjudgment order disallowing the disbursements of plaintiffs' counsel and remanded the case to the trial court for redetermination of those costs in view of the trial court's inherent discretion under Code of Civil Procedure section 1033.5(c) to determine and subsequently disallow any disbursements of counsel that were not "reasonably necessary" to the conduct of the litigation. (Id. at 1167-1168.) This case indicates that a trial court does have discretion to consider whether to award fees under section 1033.5.

In direct contrast to Bussey is the more factually relevant case of Levy v. Toyota Motor Sales, U.S.A., Inc. ((1992) 4 Cal.App.4th 807), where the reviewing court appropriately applied the abuse of discretion standard of review in a Song-Beverly case in which a prevailing buyer sought review of the trial court's order granting the defendant dealer's motion to tax costs. According to the facts presented on appeal, the prevailing buyer had requested attorneys' fees in the amount of $137,459.00 and certain "other" costs in the amount of $2,106.41 (which included expenses relating to vehicle inspections conducted by his retained expert) pursuant to Civil Code section 1794(d) in his memorandum of costs. (Id. at 811, 816.)

The losing dealer subsequently filed a motion to tax costs requesting that the trial court strike or substantially reduce several cost items, including the buyer's request for "other" costs (which, again, included expenses relating to vehicle inspections conducted by his retained expert) on the basis that ". . . these items appeared to reflect certain items that are not provided for under Code of Civil Procedure section 1033.5."(Id.) In opposition to the motion, the prevailing buyer argued that "'out of pocket expenses of

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litigation which are normally billed to the client and not included in the overhead component of the attorney's hourly rate are recoverable . . . .'" (Id. at 816.) At the hearing on the motion to tax costs, the trial court reduced the buyers' claim for attorneys' fees from $137,459.00 to $30,000.00, and the buyers' "other" disputed costs from $2,106.41 to $1,000.00. (Id. at 811-812.)

The prevailing buyer appealed from the trial court's order granting the defendant dealer's motion to tax costs, contending that the trial court erred in reducing the amount sought for the above-mentioned "other" costs. (Id. at 812.) The Court of Appeal affirmed the trial court's order in all respects.

First, in concluding that the abuse of discretion standard was the appropriate standard for reviewing an order to tax costs under Code of Civil Procedure section 1794(d), the Levy court reasoned as follows:

> The Song-Beverly Act provides, in Civil Code section 1794, subdivision (d): "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorneys' fees based on actual time expended **determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action."**
>
> It is true, as Levy contends, that the language of the act is mandatory, providing the buyer "shall" recover costs, including attorney fees. However, the statute requires payment of only those costs and fees "determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution" of the underlying action. Similarly, Code of Civil Procedure section 1033.5 provides in subdivision (c) that allowable costs "shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation," and in addition, that such costs "shall be reasonable in amount." We therefore review the trial court's order taxing costs under the abuse of discretion standard. (E.g., Posey v. State of California (1986) 180 Cal.App.3d 836, 852 [225 Cal.Rptr. 830].)

(Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 813 n.2, (emphasis in original).

Second, in applying the abuse of discretion standard to the prevailing buyer's appeal from the trial court's order granting the defendant dealer's motion to tax costs with

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respect to the disputed "other costs" (including expenses relating to vehicle inspections conducted by his retained expert), the Levy court averred as follows:

> "If the items on a verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred. [Citations.] Where the items are properly objected to, they are put in issue, and the burden is upon the party claiming them as costs. [Citation]." (Rappenecker v. Sea-Land Services, Inc. (1979) 93 Cal.App.3d 256, 266 [155 Cal.Rptr. 516].)
>
> In our case, Levy offered no substantiation of the challenged charges in response to respondent's objections. Nothing in the record indicates which of his claimed expenditures were allowed, reduced, or disallowed, or how the court arrived at its determinations. As was the case regarding attorney fees, we cannot say the trial court abused its discretion in taxing these costs. We therefore presume the court, in its sound discretion, found that the charges were excessive, and should therefore be reduced to $1,000. (County of Kern v. Galatas (1962) 200 Cal.App.2d 353, 360 [19 Cal. Rptr. 348].)

(Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 816-817.)

In the present case, unlike the clear state of the record in the Bussey case described above in which the trial court evidently denied the prevailing party's request for expert witness fees solely as a matter of law based on an interpretation of Code of Civil Procedure section 1033.5, it is not patently apparent from the record on appeal herein nor any reasonable inferences deduced therefrom that the trial court's denial of JENSEN's request for expert witness fees was in fact premised solely on a ruling as a matter of law that Code of Civil Procedure section 1033.5 by its explicit terms does not allow for expert witness fees to be awarded in this case. In fact, a plain and fair analysis of the record on appeal on this point demonstrates that the record is equivocal at best, and indicates that the trial judge likely made his ruling on this matter principally in the exercise of the inherent discretion afforded him under Civil Code section 1794 and Code of Civil Procedure section 1033.5.

Specifically, as indicated above, at the hearing on JENSEN's and BMW's cross-motions with respect to JENSEN's request for expert witness fees, the trial judge stated:

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> With respect to the request for expert witness fees, those are denied. There's been no explanation of the way around CCP section 1033.5. So that would bar expert fees in this situation, **in any event**. So those fees are denied.

(RT 685:25-686:3 (emphasis added).)

By including the words "in any event" in his ruling, it is obvious and logical that the trial judge relied upon Code of Civil Procedure section 1033.5 in the alternative, or as a fall-back position, and was principally exercising his vested discretion in connection with the motion to tax costs. Such an interpretation of the trial judge's ruling would be entirely consonant with the alternative arguments proffered by BMW at that time in its papers: (1) that JENSEN was not entitled to any requested costs in this matter, including expert witness fees, specifically prohibited by Code of Civil Procedure section 1033.5(b) absent affirmative proof proffered by JENSEN that in including the term "expenses" in Civil Code section 1794(d), the legislature intended that recovery of expert witness fees may be had under Code of Civil Procedure section 1033.5; and/or (2) that JENSEN was not entitled to any costs, including expert witness fees, not affirmatively shown by JENSEN to have been reasonably incurred in connection with the commencement and prosecution of this action. (CT 425:21-428:10 [Cross-Respondent's Opposition to Cross-Appellant's Motion for Award of Attorneys' Fees, Expenses, Costs and Prejudgment Interest]; CT 489:1-16 [Cross-Respondent's Motion to Tax and/or Strike Costs, Attorneys' Fees and Expenses].) (cf., Bussey v. Affleck, 225 Cal.App.3d at 1165, in which the trial court's ruling deferred exclusively to, and was based upon, defendant's sole argument that "... expert witness fees, ... could not be awarded under subdivision[] (b)(1) [of section 1003.5] ....")

In addition, with respect to JENSEN's request for expert witness fees, the trial court's minute order of this date is vague and unavailing to JENSEN's contention: "Defense [sic] motion as to expert witness fees: denied." (CT 641.) As indicated above, although JENSEN makes specific reference in her notice of cross-appeal (Supplemental CT 1-2) that she is appealing from the trial court's order dated May 23, 1994, denying her

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expert witness fees, this order is not included in the record on appeal and should not be considered by this court for any purpose on this cross-appeal. (CNA Casualty of California v. Seaboard Surety (1986) 176 Cal.App.3d 598, 619 (references to matters outside the record on appeal are not reviewable or otherwise cognizable on appeal).) Further, this Court should presume that the record supports BMW's position on all facts not appearing in the record, including any facts that may be contained in the order on this point. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564; Walling v. Kimball (1941) 17 Cal.2d 364.)

Notwithstanding JENSEN's contrary assertion, the appropriate standard of review on this appeal is the abuse of discretion standard. (Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 813; see also, Lubetzky v. Friedman (1991) 228 Cal.App.3d 35, 39 (whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion); cf., Bussey v. Affleck (1990) 225 Cal.App.3d at 1165.)

B. SINCE THERE HAS BEEN NO MANIFEST SHOWING BY JENSEN THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HER EXPERT WITNESS FEES NOTWITHSTANDING HER STATUS AS THE PREVAILING BUYER IN THIS SONG-BEVERLY ACTION, THE TRIAL COURT'S RULING MUST BE AFFIRMED

It is a well-established appellate principle that the appellate court is to be concerned only with the correctness of the trial court's ruling, not with its reasoning. (Sam Andrews' Sons v. ALRB (1988) 47 Cal.3d 157; Bealmear v. Southern Cal. Edison Co. (1943) 22 Cal.2d 337.) As a corollary, it is similarly well-established that if the trial court's decision was correct on any legal ground, it will be affirmed even if the reasons cited are wrong. (West Pico Furniture Co. v. Superior Court (1961) 56 Cal.2d 407.)

The appellate court presumes that the order or judgment appealed from was correctly decided by the trial court. (Aviointeriors Spa v. World Airways, Inc. (1986) 181 3 Cal.App.3d 908, 914; Denham v. Superior Court, 2 Cal.3d at 564; Walling v. Kimball, 17 Cal.2d at 373.) The presumption favoring the trial court's decision places the burden of

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proving error on the appellant, and the appellant must prove, by reference to relevant law and the record, that the trial court's decision was in error. (Marriage of Behrens (1982) 137 Cal.App.3d 562, 574; Rossitor v. Benoit (1979) 88 Cal.App.3d 706, 712; Kriegler v. Eichler Homes, Inc. (1969) 269 Cal.App.2d 224, 226.) The trial court's exercise of discretion, although not unfettered, is entitled to great deference on appeal as long as it is "based on a 'reasoned judgment' and complies with the . . . legal principles and policies appropriate to the particular matter at issue." (Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal.3d 801, 815; Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 816-817 (within Song-Beverly context).)

In the present case, although JENSEN contends that the record on appeal demonstrates that the trial court's denial of JENSEN's request for expert witness fees was in fact premised solely on a ruling as a matter of law that Code of Civil Procedure section 1033.5 does not allow for expert witness fees, as indicated above, a plain reading of the record on appeal demonstrates that the trial judge likely made his ruling on this matter principally in the exercise of the inherent discretion afforded him under Civil Code section 1794 and Code of Civil Procedure section 1033.5. Moreover, although the record concededly supports the notion that the trial judge may have relied upon Code of Civil Procedure section 1033.5 in the alternative, or as a fall-back position, this court should appropriately indulge the presumption favoring the correctness of the trial court's discretionary ruling, and need not consider the trial court's alternative reasoning relating to Code of Civil Procedure section 1033.5.

Further, in the present case, JENSEN has simply not come forward with even a scintilla of evidence to demonstrate an abuse of the trial court's discretion in ruling against her with respect to her request for expert witness fees, especially in view of the fact that the trial court awarded JENSEN $59,996.00 in costs, attorneys' fees, and prejudgment interest in a case in which the verdict totaled $88,053.00. (CT 382-388, 466-471, 641; RT 686-687.) It is entirely probable that the trial court, in the exercise of its vested discretion, (and after listening to the testimony of the expert involved) found that

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this aggregate amount was more than adequate and reasonable to compensate JENSEN for the costs, fees, and expenses incurred in connection with her prosecution of the subject action. Absent cogent evidence to the contrary adduced by JENSEN demonstrating an abuse of discretion, this court should presume that the trial court, in its sound discretion, and in compliance with the legal principles and policies appropriate to this matter, found that JENSEN's requested expert witness fees should not be allowed. JENSEN's appeal on this matter should be summarily denied. (Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 816-817.)

C. IF, ALTERNATIVELY, THIS COURT DECIDES THAT JENSEN IS ENTITLED TO DE NOVO REVIEW OF THE TRIAL COURT'S RULING DENYING HER EXPERT FEES AS A QUESTION OF LAW ON THIS CROSS-APPEAL, THE TRIAL COURT DID NOT ERRONEOUSLY CONCLUDE THAT CODE OF CIVIL PROCEDURE SECTION 1033.5 PRECLUDES AN AWARD OF EXPERT WITNESS FEES IN THIS SONG-BEVERLY ACTION BY ITS EXPLICIT TERMS

In her Opening Brief, JENSEN ostensibly contends that the controlling general language of Code of Civil Procedure section 1033.5(b) ("except when expressly authorized by law") indicates that expert witness fees are allowable in this case notwithstanding the express language of Code of Civil Procedure section 1033.5(b)(1) which precludes an award of expert fees unless ordered by the court.[25/] (AOB 35-36.) Specifically, JENSEN reasons that expert witness fees are "expressly authorized by law" in this case because the legislature intended that prevailing buyers in a Song-Beverly action be entitled to expert witness fees as "expenses" inasmuch as Civil Code section 1794 by its express terms states that a prevailing buyer shall be allowed to recover both "costs" and "expenses." (AOB 35-36.)

[25/] It is undisputed, and not in issue on this appeal, that the trial court did not "order" expert witnesses in this case.

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In support of this contention, JENSEN cites to the cases of Bussey v. Affleck, supra, and Beasley v. Wells Fargo Bank ((1991) 235 Cal.App.3d 1407, 1419), for her implicit proposition that a court may conclude that expert witness fees are "expressly authorized by law," and are therefore allowable notwithstanding the language of Code of Civil Procedure section 1033.5(b)(1), by looking to other applicable statutes which may, but by their terms do not expressly provide for, awards of expert witness fees. This rationale is untenable, and has been explicitly rejected by the Third District Court of Appeal in the recent case of Ripley v. Pappadopoulos. ((1994) 23 Cal.App.4th 1616.)

In Ripley, the Third District wisely declined to follow the misguided rationale of Bussey v. Affleck and Beasley v. Wells Fargo Bank, and concluded that the trial court had erred in including expert witness fees and other charges in its cost award to the prevailing party in connection with a cost and attorney fee clause of a limited partnership agreement. In reaching this decision, the Ripley court first reasoned that Code of Civil Procedure section 1033.5(b)(1) provides that fees of experts not ordered by the court are not allowable as costs unless expressly authorized by law, and the statutes addressing compensation of expert witnesses in general do not provide for such expenses in a cost award (Code of Civ. Proc. § 2034; Gov't Code § 68092.5):

> As a general rule the parties to the litigation are required to finance their own participation in the litigation. This general rule is subject to numerous exceptions, including those found in Code of Civil Procedure section 1032, subdivision (b), which provides that unless otherwise statutorily prohibited, the prevailing party is entitled to recover "costs." The primary statutory provision with respect to the types of expenses that may or may not be included in a cost award under Code of Civil Procedure section 1032 is found in section 1033.5 of that code.
>
> Subdivision (a) of Code of Civil Procedure section 1033.5 provides a list of expense items which are allowable as costs under section 1032. This list includes ordinary witness fees and the fees of expert witnesses ordered by the court (§ 1033.5, subd. (a)(7) & (8). [Footnote omitted.] The list of allowable costs also includes attorney fees when authorized by statute or contract. (§ 1033.5, subd. (a)(10).)
>
> Subdivision (b) of Code of Civil Procedure section 1033.5 provides a list of items which are not allowable as costs except

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> when expressly authorized by law. Among other things, this latter list includes the fees of experts not ordered by the court . . . . (§ 1033.5, subd. (b)(1), (2) & (3).)

(Ripley v. Pappadopoulos, 23 Cal.App.4th at 1622-1623.) Further:

> [We] are compelled to disagree with the court in Bussey. We begin with the major component of the costs to which defendants object, the expert witness fees. As we have noted, Code of Civil Procedure section 1033.5, subdivision (b)(1), provides that the fees of experts not ordered by the court are not allowable as costs unless expressly authorized by law. The statutory provisions dealing with the compensation of experts in general do not provide for the recovery of such expenses in a cost award. The compensation of an expert is, in the first instance, the responsibility of the party who hires the expert. If during discovery proceedings a party designates an expert, then any other party may depose the expert and may require the expert to give testimony before a court . . . . In that event the party desiring to depose the expert or requiring the expert to testify must pay the expert's fees for the time required for the deposition and/or testimony. (Code of Civil Procedure § 2034, subd. (i); Gov. Code § 68092.5.) In other respects the compensation of the expert remains the responsibility of the party who hired the expert. (Ibid.) Neither Code of Civil Procedure section 2034 nor Government Code section 68092.5 provides for the recovery of expert witnesses in a cost award.

(Ripley v. Pappadopoulos, 23 Cal.App.4th at 1624.)

Second, the Ripley court reasoned that the legislature has specifically reserved the power to determine when expert fees should be recoverable, and they may not otherwise be recovered in a cost award unless expressly authorized by the Legislature:

> In numerous specific types of cases the legislature has seen fit to require the losing party to reimburse the prevailing party to reimburse the prevailing party for the payment of expert witness fees. [Footnote omitted.] And in any case in which the court appoints an expert and apportions the expense to the parties, the prevailing party may recover his or her share of the expense as a cost of litigation. (Evid. Code § 731; Code Civ. Proc., § 1033.5, subd. (a)(8).) When the numerous statutory provisions in which expert witness fees are expressly declared recoverable are considered together with the express prohibition against the inclusion of such fees in a cost award otherwise, the Legislature's intent becomes clear. The Legislature has reserved to itself the power to determine selectively the types of actions and circumstances in which expert witness fees should be recoverable as costs and such fees may not otherwise be recovered in a cost award.
>
> . . .

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> In Bussey the court attempted to avoid the statutory prohibition against the inclusion of expert witness fees in a cost award by equating expert witness fees and other nonallowable costs of litigation with attorney fees and by concluding that such costs may be included in an award of contractual attorney fees. We cannot adhere to that approach. In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorneys fees do not include such costs and costs do not include attorneys fees. [Citation omitted.]

(Ripley v. Pappadopoulos, 23 Cal.App.4th at 1624-1626.)

In the present case, JENSEN points to several documents in her Opening Brief purporting to show that the legislature intended that prevailing buyers in a Song-Beverly action be entitled to expert witness fees as "expenses" under the language of Civil Code section 1794 in support of her contention that expert witness fees are allowable in this case notwithstanding the express language of Code of Civil Procedure section 1033.5(b)(1) which precludes an award of expert fees unless ordered by the court. (AOB 35-36.) However, based upon the rationale of Ripley, JENSEN's contention must fail. Had the legislature intended that expert witness fees be recoverable in a Song-Beverly action, then presumably it would have said so less obliquely, as it has in other types of actions. (Ripley v. Pappadopoulos, 23 Cal.App.4th at 1624-1625.) Therefore, if this court decides that JENSEN is entitled to de novo review of the trial court's ruling denying her expert fees as a question of law on this cross-appeal, the trial court did not erroneously conclude that Code of Civil Procedure section 1033.5 precludes an award of expert witness fees in this Song-Beverly action by its explicit terms, and JENSEN's appeal on this matter should be summarily denied.

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D. IF JENSEN IS ENTITLED TO DE NOVO REVIEW OF THE TRIAL COURT'S RULING DENYING HER EXPERT FEES AS A QUESTION OF LAW ON THIS CROSS-APPEAL, AND THIS COURT LIKEWISE FINDS THAT THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT CODE OF CIVIL PROCEDURE § 1033.5 PRECLUDES AN AWARD OF EXPERT WITNESS FEES IN THIS SONG-BEVERLY ACTION BY ITS EXPLICIT TERMS, THEN THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER CONSIDERATION

In the event this Court reverses the trial court's postjudgment order disallowing JENSEN's expert witness fees as a matter of law, this matter should be appropriately remanded to the trial court for redetermination of these claimed fees in view of the trial court's inherent discretion under Code of Civil Procedure section 1033.5(c) and Civil Code section 1794(d) to determine, and subsequently disallow, any disbursements of counsel that were not "reasonably necessary" to the conduct of the litigation. (Bussey v. Affleck, 225 Cal.App.3d at 1167-1168; Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal.App.4th at 813 (Despite mandatory language of Civil Code section 1794(d), Code of Civil Procedure section 1033.5(c) and Civil Code section 1794 vest the trial judge with discretion in connection with the awarding of attorneys' fees, costs, and expenses sought by a prevailing party in a Song-Beverly action.).)

IX. CONCLUSION

For the foregoing reasons, Cross-Respondent BMW respectfully requests that this Court deny JENSEN's cross-appeal in its entirety.

DATED: January 17, 1995

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By _____
HENRY D. NANJO
Attorneys for Defendant, Appellant and Cross-Respondent BMW OF NORTH AMERICA INC.

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RE: JENSEN v. BMW
COURT: Court of Appeal, Third Appellate District
ACTION NO: 3 Civil CO18430

DECLARATION OF PERSONAL SERVICE

I, NORMAN E. ALLEN, declare:

That I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action;

That on January 17, 1995 at Sacramento, California, I personally served a document in the above-entitled action described as:

APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

That I delivered the original and a true copy thereof to:

California Court of Appeal
THIRD APPELLATE DISTRICT
900 N Street, Room 400, 4th Floor
Sacramento, California 95814

CALIFORNIA SUPREME COURT
Library and Courts Building
Sacramento, California 95815

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of January, 1995, at Sacramento, California.

NORMAN E. ALLEN

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Reply MJN168

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is 2720 Gateway Oaks Drive, Suite 250, Sacramento, California 95833-3501.

On this date, I served the foregoing document, described as APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF, addressed as follows:

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San Francisco, California 94102

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X (BY MAIL) I am familiar with the business practice of Lewis, D'Amato, Brisbois & Bisgaard with regard to collection and processing of correspondence for mailing with the United States Postal Service. The correspondence described above was sealed and placed for collection and mailing on the date stated below. Pursuant to said business practices correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

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Executed on January 17, 1995 at Sacramento, California.

Genevieve E. O'Keefe

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On May 11, 2023, I served the foregoing document described as: **EXHIBITS IN SUPPORT OF PETITIONERS' MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF** on the parties in this action by serving:

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I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on May 11, 2023, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Chris Hsu
Chris Hsu

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. FCA US**
Case Number: **S274625**
Lower Court Case Number: **E073766**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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3. I served by email a copy of the following document(s) indicated below:

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Filing Type	Document Title
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REQUEST FOR JUDICIAL NOTICE	Motion for Judicial Notice
ADDITIONAL DOCUMENTS	Exhibits in Support of Motion for Judicial Notice

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/11/2023

Date

/s/Chris Hsu

Signature

Tobisman, Cynthia (197983)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

Law Firm