S246444

IN THE

SUPREME COURT OF CALIFORNIA

ALLEN KIRZHNER

Plaintiff and Appellant,

v.

MERCEDES-BENZ USA, LLC

Defendant and Respondent.

FROM A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE
CASE NUMBER G052551

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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I.

INTRODUCTION

This Answer Brief on the Merits by Respondent Mercedes-Benz USA, LLC ("MBUSA") addresses the Opening Brief on the Merits ("Opening Brief") filed by Appellant Allen Kirzhner ("Appellant").

II.

IDENTIFICATION OF ISSUES PRESENTED FOR REVIEW

California's Song-Beverly Consumer Warranty Act (the "Act") provides that if a manufacturer is unable to repair defects covered by its written express warranty which substantially impair the use, value or safety to the consumer buyer after a reasonable number of attempts, it must repurchase or replace the vehicle. (Civ. Code § 1793.2, subd. (d)(2)). Despite that, this case is not about any *breach* of any duties under the Act. Although the Act has many other duties and requirements, the issues in this case are limited solely to the definition of only one of them. Further, the issues are limited to what restitutionary damages Appellant is entitled to under the Act in the context of an offer to compromise issued by MBUSA under section 998 of the California Code of Civil Procedure. Nothing more.

Here, Appellant seeks a relatively modest sum of only $680, despite this being a compromise settlement with no admission of liability. In reality however, Appellant is seeking (as part of a now-numerous well-motivated and coordinated Plaintiff lemon law bar that sought to de-publish the Court of Appeal's opinion) a broad expansion of

damages and *liability* under the Act beyond what it plainly says and far beyond what the Legislature intended.

This case history and record is an excellent example of how the Act unfortunately has been exploited for no valid litigation objectives. It thus presents this Court with the opportunity to settle two extremely important questions of law which are present in many lemon law cases now currently clogging California's trial courts. In the past, while this Court and the Courts of Appeal have consistently recognized a California consumer's rights under the Act, both have also simultaneously recognized its limits consistent with what the Legislature intended, including the recognition that manufacturers have legal rights too as part of their valuable contributions to this state's consumer body and economy. Against this background, the two issues presented for review are the following:

1. Are *post-sale* vehicle registration fees recoverable by a consumer under the Act as *restitution of the vehicle's purchase price* pursuant to Civ. Code § 1793.2, subd. (d)(2)(B) following acceptance of MBUSA's Code of Civil Procedure § 998 offer to settle the case?

2. Are *post-sale* registration fees alternatively recoverable as an "*incidental damage*" under the Act pursuant to Civ. Code § 1793.2, subd. (d)(2)(B) following acceptance of MBUSA's Code of Civil Procedure § 998 offer to settle the case?

III.

SUMMARY OF ARGUMENT

This is really a simple case of statutory construction of this single statute which is clear and unambiguous. Appellant never challenged otherwise in the courts below.

First, although pro-consumer, the Act manifestly does not permit anything other than restoring the buyer/lessee to the *status quo ante* in the *restitution* context. Reimbursement for all post-sale registration fees, which are admittedly not incurred as part of the original sale *price*, and are simply incurred later, simply does not comport with the plain wording of the Act. Instead, it would effectively confer a windfall on the consumer buyer beyond what the Legislature intended.

None of the various arguments Appellant advances in his lengthy Opening Brief can change this duck, which looks, walks, quacks, and swims like one.

Appellant argued very little of the substance of his newly-minted arguments in the appellate court below (in the trial court nothing at all), but now essentially attempts to recharacterize the two limited issues in this case into something they are not. This case is not about MBUSA's *liability* under the Act. Regardless, since the statute at issue simply does not yield the answer he seeks, he instead changes the argument. That does not work. Therefore, his real goal of (not very subtly) seeking an unwarranted expansion of the Act's damages, and even *liability* should be summarily dismissed. Instead, *this case is solely limited to what damages Appellant is entitled to only under this one statute,* Civil Code section 1793.2, subd. (d)(2)(B).

Appellant cites little law in support of his novel interpretations of the Act (most of it unnecessary and inapposite), and with all due respect, it is not as complicated as he suggests to the point that the courts consistently get it wrong and only he has some prodigal savant-like insights into its true meaning no other human being can comprehend. This does not involve translation of undecipherable Egyptian hieroglyphics, or use of a Rosetta stone There is no need to dive into the Act's Legislative history for the first time here. No matter how hard he tries, neither Appellant's examples nor inapt analogies can morph this claim into something else. Instead, in the end, despite consumption of sixty (60) pages in his Opening Brief, his claim for post-sale/lease registration fees were neither part of the vehicle's sale or lease *price*.

Second, post-sale/lease registration fees alternatively cannot be "incidental damages" because it is obvious these fees were not incurred, and could not have been incurred, as a result of the breach of any warranty. The statute at issue remains bulletproof. No matter how hard Appellant now tries for a second bite of the appellate apple, even with his greatly-expanded sixty (60) page Opening Brief, including his curious and interesting attempt to fashion ambiguity into this simple statute by creating new duties having no legal support anywhere and needlessly poking into the Legislative history, he simply cannot get past the plain statutory wording the Court of Appeal needed but a few paragraphs to address.

IV.

FACTUAL BACKGROUND/STATEMENT OF THE CASE

A. PRELIMINARY FACTS

Appellant leased a 2012 Mercedes-Benz C250W vehicle (the "vehicle") on June 6, 2012. (AA 52-54.)[1]

MBUSA is a motor vehicle distributor in the state of California which expressly warranted the vehicle. (AA 2.)

Appellant filed his Complaint on September 11, 2014 alleging, *inter alia*, a cause of action for breach of express warranty under the Act, and prayed for vehicle *restitution*, plus reasonably-incurred court costs, attorney's fees and expenses. (AA 1-10.)

MBUSA filed its Answer on October 8, 2014, denying all liability. (AA 11-15.)

Almost immediately after Answering, MBUSA sought very limited discovery to ascertain Appellant's damages, which was ignored. (AA 59-60.)

B. SETTLEMENT OF THE CASE

On March 2, 2015, MBUSA served Appellant with an *Amended*[2] Offer to Compromise under Code of Civil Procedure section 998 (the "Offer"), which stated in pertinent part as follows:

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[1] The record below consists of Appellant's Appendix filed in lieu of the Clerk's Transcript ("AA").

[2] An earlier repurchase offer went out almost immediately on November 19, 2014 that is not part of the Appendix because Appellant never raised such arguments in the trial court and MBUSA initially did not deem it necessary at the time. It can be provided upon request.

> 1. Pursuant to California Civil Code § 1793.2(d)(2)(B), in exchange for the subject vehicle, MBUSA offers to make restitution in an amount equal to the actual price paid or payable by the Plaintiff, including any charges for transportation and manufacturer-installed options, but excluding non-manufacturer items installed by a dealer or the Plaintiff, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer, less reasonable mileage offset in accordance with Civil Code Section 1793.2(d)(2)(C), all to be determined by court motion if the parties cannot agree.
>
> [...]
>
> Additionally, in connection with the above alternative offers to compromise, MBUSA will pay Plaintiff a sum equal to the aggregate amount of costs and expenses, including attorney's 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 this action pursuant to Civil Code § 1794(d), to be determined by court if the parties cannot agree.

(AA 18 – 19.) The Offer's first paragraph tracked section 1793.2(d)(2)(B) of the Act and did not contain any specific monetary amounts, which could "be determined by court motion if the parties cannot agree." (AA 18-19).

Significantly, the Offer did not contain any *civil penalty* component under Civil Code section 1794, subd. (c), reflective of any possible claim Appellant might have that MBUSA "willfully" and in bad faith did not repurchase the vehicle. (AA 18-19.)

Again seeking Appellant's unknown damages, MBUSA served Appellant with another written request for itemized damages. (AA 60-61.)

Appellant accepted the Offer on April 2, 2015. (AA 16–22.)

On May 15, 2015, the trial court entered Judgment, with the accepted Offer as an exhibit. (AA 23–27.) The Judgment also contained no specific dollar amounts. (AA 23–27.)

What occurred next can only best be described as a bizarre course of conduct intended to delay and harass, and outright games playing. After acceptance of the Offer, Appellant simply demanded, without providing any information and documentation supporting any dollar amounts, that MBUSA satisfy the Judgment by stating "please send a check ASAP," completely ignoring MBUSA's repeated pleas for a specific monetary demand. (AA 34.) MBUSA also vehemently disputed the self-serving alleged summary of events provided by Appellant's counsel via declaration only, including counsel's claim of purportedly making numerous untraceable and unprovable "telephone calls" regarding negotiating a settlement. (AA 33-37; 60-62.) Instead, it was Appellant's counsel who initially engaged in this counter-productive strategy, and seemed genuinely annoyed by the entire process. (AA 33-37; 62-64.)[3]

Appellant's untoward strategy is further support by his "Motion for an Order Determining the Amounts Due Under Paragraph One of Defendant's 998 Offer", which was heard on July 9, 2015. (AA 28–57.) Appellant demanded MBUSA arbitrarily pay him "$54,900.39", a figure never claimed before, and which was also more than what he prayed for in his Complaint. (AA 62-64.) And, while the Motion also contained a

[3] Although also not part of the record because it was also not deemed necessary at the time, the delay in payment was actually due to Appellant's counsel's continued strategy of delay, harassment and games playing, including demanding the settlement checks be provide and cleared the bank before vehicle surrender, which can be provided upon request. In fact, MBUSA argued in a subsequent motion this was some of the worst conduct by opposing counsel seen in over 25 years of practice, referencing Appellant counsel's judicial reprimand for his similar litigation tactics in *Hyundai Motor America v. Superior Court* (2015) 235 Cal.App.4th 349. The "lemon law game" today is, once a case is determined to be a "winner", to delay settlement as long as possible to continue to run up the fee meter.

Declaration from Appellant himself *finally* submitting some specific monetary claims, it was still remained a puzzle which the Motion made no further attempt to clarify. (AA 38-39; 60-64). Despite his claim, the Motion had less than one page of argument which essentially said nothing, other than MBUSA was obligated to pay it. (AA 31-32.)

Appellant made no argument MBUSA breached any "repurchase obligation" the Act might impose, and he did not (and could not) allege any *civil penalty* damages. In fact, his Motion was so vague and elusive that MBUSA itself had to take an educated guess at attempting to itemize what he was likely claiming. (AA 62-63.) To this end, the Motion appeared to include the sum of $680 for post-lease subsequent year registration payments for 2013, 2014 and 2015. (AA 28–40; 63.) Appellant also appeared to claim, *inter alia*, "vehicle insurance" in the amount of $715 and "lost income" in the amount of $2,752. (AA 39; 63.)

On August 28, 2015, the trial court ruled. (AA 160-168.) Preliminarily, the trial court noted Appellant had failed to itemize his claim (as MBUSA had repeatedly requested), and appreciated MBUSA efforts for taking the laboring oar to essentially do it for him:

> "...Plaintiff should have laid out how he arrived at his total. The raw data is in the moving Kirzhner Declaration...but he should have illustrated the mazes of calculations that were used to arrive at the final figure...Defendant undertook the helpful task of disclosing the calculations behind's Plaintiff's figure. The Court uses Defendant's table [in its Opposition Brief]". (AA 161.)

The trial court determined, *inter alia*, that MBUSA did not owe any sum representing the post-lease subsequent year registration fees for 2013, 2014, and 2015, a

claim totaling $680. (AA 162–164, 174–75.) Specifically, after citing the relevant statute (Civil Code § 1793.2(d)(2)(B)), the trial court stated as follows:

> According to the court's independent research, the registration fees under the statute, do not include all registration fees that a buyer pays over the course of the lease. See *Robbins v. Hyundai Motor America* (C.D. Cal., Aug. 7, 2014) 2014 WL 4723505 at *4; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 813. Thus, the requested fees by plaintiff are not part of the restitution remedy. (AA 163).

The trial court also denied Appellant's claims for "vehicle insurance" and "lost income", which he never bothered to appeal. (AA 159-169.)[4]

Appellant filed his Notice of Appeal on September 1, 2015. (AA 176-178.)

C. THE APPEAL

At the Court of Appeal, Appellant's Opening Brief arguments consisted of only five (5) full pages. On both issues, he conceded that nothing more than simple statutory construction was at issue. He referenced the Act, made a brief reference to the California Commercial Code, and cited three California cases but provided no Legislative history.

In response, MBUSA advanced ostensibly the very same straightforward arguments the Court later adopted in its terse six (6) page Opinion.

D. THE COURT OF APPEAL'S OPINION

The Court of Appeal issued its unpublished Opinion on November 27, 2017.[5]

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[4] MBUSA did claim a mileage offset pursuant to Civil Code section 1793.2(d)(2)(c). The trial court denied it not because MBUSA had no such legal entitlement, but only because it failed to prove it adequately.

[5] See Exhibit 1 to this Answering Brief.

First, the Court of Appeal simply interpreted the "wording and structure of the statute," concluding that post-sale/lease registration fees did not constitute part of "the actual price paid or payable by the buyer" as Civil Code § 1793.2(d)(2)(B) defined, and also, that the only "collateral charge" representing registration fees associated with that phrase were the fees paid when the vehicle was initially purchased or leased. (Opinion at page 5.)

Second, in a similar exercise of statutory construction, the Court of Appeal easily concluded that such post sale/lease registration fees are not the same types of specifically-described damages ("reasonable repair, towing and rental car costs") which must be "the result of" the warranty's breach. (Opinion at page 5.) Instead, it classified such registration fees as the "standard cost of owning any vehicle" and was concerned that this would otherwise open up a "Pandora's box" of potential costs for which a manufacturer would need to pay in lemon law cases, such as "costs for gas, car washes, oil changes". (Opinion at pages 5-6.) The Act simply provides nothing else.

The Court of Appeal subsequently issued an order certifying the Opinion for publication on December 13, 2017.[6]

[6] See Exhibit 2 to this Answering Brief.

V.

ARGUMENT

A. THE COURT OF APPEAL RULED CORRECTLY IN CONCLUDING THAT APPELLANT WAS ONLY ENTITLED TO RECOVER THE REGISTRATION FEES HE PAID WHEN HE ACQUIRED THE VEHICLE.

Appellant first contends that the Court of Appeal erred in denying Appellant his post-lease registration fees by misconstruing subdivision (d)(2)(B) of Civil Code section 1793.2. He is incorrect.

1. Interpretation Of Civil Code § 1793.2(d)(2)(B) Is One Of Simple Statutory Interpretation And Construction.

The key to statutory interpretation involves application of rules of construction in proper sequence. *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238. First, the actual language of the statute is examined, giving words their ordinary and everyday meaning. *Id.* If the words are reasonably free from ambiguity and uncertainty, you simply apply the given language. *Id.* at 1239; *Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 219. However, if the words are not clear, a second step is necessary to refer to the Legislative history. *Halbert's, supra*, at 1239. The final step only applies if the first two steps fail to reveal clear meaning, and that is to "apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable, in accord with common sense and justice, and to avoid an absurd result." *Id.* at 1239-1240; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 122-123.

Applying these rules of construction, the Court of Appeal correctly interpreted the intent of the statutory phrases "actual price paid or payable by the buyer," and "including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees...." As the Court of Appeal stated, post-lease registration fees do not fall within either of these statutory phrases, and "the wording and structure of the statute dictate otherwise." (Opinion at page 5.) This specific statute addresses vehicle *restitution*, which has a specific meaning, in the context of the phrase "actual price paid or payable by the buyer."

First, the term *restitution* was discussed in the case of *Mitchell v. Bluebird Body Company* (2000) 80 Cal.App.4th 32. There, that Court interpreted section 1793.2(d)(2) of the Act with respect to the plaintiff's claim for finance interest. Although the court noted that the Act did not expressly list finance charges as an item of recovery, it noted that the Act expressly characterized the refund remedy as *restitution* which was "intended to restore 'the *status quo ante* as far as is practicable.'" 80 Cal.App.4th at 36. Lastly, the Court concluded:

> "A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount *actually expended for a new motor vehicle*, including paid finance charges, less any of the expenses expressly excluded by the statute..." *Id.* at 37.

By parity of reasoning, it follows that restoration of the *status quo ante* does not include reimbursement of registration fees for successive years beyond the vehicle's first year. They are incurred in subsequent years. Further, these post-year charges could not be *actually expended for a* ***new*** *motor vehicle.* Once the vehicle is driven off the lot and

paid for, that process was completed (save and except an installment lease or finance case). Thus, requiring post-sale reimbursement would essentially result in a windfall to the consumer. Accordingly, *restitution* is simply the well-known and understood notion that under the Act, the consumer customer returns the vehicle to the manufacturer in exchange for what was paid.

Additionally, the Court of Appeal correctly concluded that the "collateral charges" items, which included "registration fees", were logical examples of those charges which are customarily paid at the time the vehicle is purchased or leased. (Opinion at page 5.) After all, the phrase "the actual price paid or payable by the buyer" includes the word *price*. The common understanding of the term *price* reflects what the item cost at the time of purchase or lease. As such, there is no logical basis for Appellant to assert that *post-lease* registration fees could possibly fit these clear statutory definitions and examples. There is simply no known custom in the automotive industry whereby vehicle dealers are charging *post-sale/lease* registration fees built into the *price* of a vehicle at the time of initial sale or lease. Nor does Appellant suggest otherwise.

Both the trial court and Court of Appeal got it right.

2. Appellant's Reference To The Legislative History Was Inappropriate; Regardless, It Does Not Support His Position Otherwise.

Appellant made no argument to the trial court supporting his claim for post-lease registration fees. Likewise, in the Court of Appeal, he never suggested that interpretation of this statute was anything other than one of simple statutory construction on its face.

By contrast, he now submits volumes of Legislative history for the very first time. This is inappropriate and this Court must summarily dismiss it outright.

First, as discussed above, the statutory language is free from ambiguity and uncertainty. Likewise, in context the language is reasonable, practical and makes complete sense. There is simply no reason to delve into the Legislative history.

Parenthetically, it is noted that courts find it "difficult enough to derive legislative intent from statements *actually made* in documents associated with the legislative process" Jensen, *supra*, 35 Cal.App.4th at 125. Indeed, in looking at all of the various references Appellant submits in his Opening Brief, all of them support the already well-understood meanings the courts below articulated. Indeed, there is not a single reference anywhere in the Legislative history submitted recognizing that *post-sale/lease* registration fees should be reimbursed in exchange for a vehicle under this statute.

Even Appellant's specific reference to Assemblyperson Tanner's passage expressing a concern that lemon owners ". . . do not receive a refund on sales tax and the unused portion of the license and vehicle registration fees . . .." [7] does not support his arguments. Although the understanding of an individual Legislator who authored a bill does not establish per se "legislative intent" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 569), a fair and reasonable interpretation of that phrase is that she desired to require manufacturers to refund the sales tax and license/vehicle registration fees that were initially paid at the time of initial sale (or lease). Ultimately, that later materialized into

[7] See Opening brief at page 47.

the actual wording of Civil Code § 1793.2(d)(2)(B). So essentially, this exercise goes nowhere.

Alternatively, Appellant takes a further stab by suggesting that "If the Legislature had intended to limit the buyer's recovery to the registration fee incurred in connection with the sale, one of these reports surely would have mentioned that fact."[8] Essentially, he thus argues that the *absence* of anything to the contrary proves his position. He is again wrong, and this very argument was summarily dismissed in *Jensen*:

> As the court observed in [citations] "[the language of the statute] has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.' " [Citations.] Given the nature of the process, we conclude no inference of legislative intent may be drawn from the lack of legislative history on this particular statutory provision.
>
> 35 Cal.App.4th at 125.

Appellant's similar argument likewise has no merit.

3. Appellant's Argument That Damages Are Payable At The Time The Vehicle Is Repurchased Is Wrong.

In a further attempt to sidestep the obvious wording of this statute, and in a very convoluted way, Appellant continually ignores one of the key words in the statute — *price*—which by itself forecloses any suggestion he now makes that restitution relates to

[8] Opening Brief at page 46.

the "time the vehicle is repurchased."[9] Again, Appellant does not, and cannot, suggest that this well-understood term ("price") simply relates to what a consumer buyer pays for an item, not later charges, costs or other expenses which might later accrue—in this case, fees paid for the privilege the continued operation of this vehicle on the state's highways.

First, Appellant seizes upon the term "registration *fees*" in the alleged *plural,* as opposed to the *singular* "registration *fee*." Appellant cites no legal authority in support of his claimed insight, but his interpretation is plainly inconsistent the entire statutory intent of what is paid at the time of initial sale or lease. The amount actually paid as "registration fees" in fact appears to be a combination of a number of separate fees, including a vehicle registration fee, license fee, weight fee, special plate fee, county/district fees and owner responsibility fee. See, e.g., Vehicle Code Sections 5014, 9250.1 and 9261. It is also apparent that this term may in fact be alternatively understood in its plain everyday meaning as *singular* worded either way, as Appellant's very own lease used the term *fees* for only the amount paid at the time of lease inception.[10] This argument does not assist his case.

Finally, Appellant seizes upon the mileage offset statute to demonstrate "a legislative intent to allow the buyer to recover registration fees that are paid after the vehicle is acquired."[11] Civil Code section 1793.2(d)(2)(C) grants the manufacturer a

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[9] Opening Brief at page. 36.

[10] See (AA 52-53.) Paragraph 5 (a)(6) of the lease denotes "Registration/Titling **Fees**--$101"] [Emphasis added.]. They all appear to use the term *fees*, including "Tire Fees" and "License Fees".

[11] Opening Brief at page 37.

mileage offset. Although his argument is quite convoluted, Appellant has concluded that this statute does *not* allow the manufacturer to include collateral charges "such as sales tax, use tax, or registration fees when computing the offset," but which subdivision (d)(2)(B) allows.[12] He also references CACI 3241. Appellant however, misconstrues the statute, and in the process his argument evaporates.

In reality and contrary to what Appellant suggests, despite some of the wording differences in these respective statutes, CACI 3241 first requires the jury to determine the *purchase price* which includes, among other things, "sales tax, use tax, license fees, registration fees, and other official fees," followed by applying that very same *purchase price* to the offset formula. See CACI 3241. In other words, *the amounts are identical, and there is no recognized statutory difference between both statutes.*

Finally, even if there was a genuine difference in these two statutes, Appellant's great leap of faith argument that this means the Legislature intended to include *post-lease/sale* registration fees is an extremely odd way saying it. Instead, the better answer is if the Legislature really intended to make those fees recoverable, it could have easily said so in a much less-strained and convoluted way. Appellant's suggestion that there is a difference between these two statutes is but a mere illusion, and his entire argument (which frankly is extremely difficult to follow) collapses.

[12] Opening Brief at page 38.

4. Appellant's "Use Tax" Analogy Does Not Support His Position.

Next, Appellant seizes upon the statutory language which includes "use tax" within the "collateral charges" phrase. Because his vehicle was leased, he points out that "use tax" is incurred *after the sale is completed* and thus supports his position that post-sale registration fees are also payable. He is again wrong.

While Appellant is technically correct that "use tax" payments are paid later, he ignores the fact that leases are paid essentially in monthly *installments* with the actual pro-rated amount representing the monthly use of the vehicle, as opposed to vehicles which are purchased where the entire purchase price is paid at that time. Payment by *installments* is recognized as allowable within the statute, akin to when a purchased vehicle is also financed, with monthly payments made.[13] *Mitchell, supra,* 80 Cal.App.4th at 38.

Accordingly, as in *Mitchell* which involved finance payments on a purchased vehicle, a fair and reasonable interpretation of the statute is that lease installment payments, which include a use tax component, comports with the phrase "actual price paid or payable by the buyer". MBUSA does not dispute the fact that Appellant was entitled to a refund of his lease payments, and it paid him those payments as part of the trial court's award which it did not dispute. It also included reimbursement of the use taxes paid with each monthly lease installment payment.[14]

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[13] See Opinion at page 5 [also quoting *Mitchell*].

[14] Unlike registration or license fees, the manufacturer has a statutory right to recover all use taxes and sales taxes refunded to the consumer under the Act. Civil Code § 1793.25. Here, Appellant himself (any every other vehicle owner/lessee) can deduct from his federal tax return

5. Appellant's "Sales Tax" Analogy Equally Does Not Support His Position.

Appellant next appears to play legal semantics with respect to the term "sales tax" also included in the "collateral charges" portion of the statute. Specifically, his argument that "sales tax" is technically not incurred by the buyer is a legal distinction which has no practical significance to support his argument. Whatever its true definition is, in reality in the modern commercial world motor vehicle buyers are always charged this significant tax at the time they purchase a vehicle. Accordingly, a more fair and reasonable conclusion is that the Legislature understood that consumer buyers pay this sales tax when they purchase a new motor vehicle, and consistent with providing *restitution* if it later turns out to be a "lemon", the buyer should also be refunded that amount directly. Appellant's legal semantics with the term does not support in any way, shape or fashion that the Legislature intended other charges having nothing to do with the *actual price paid or payable* relative to the vehicle's *price* be recoverable.

6. Case Law Does Not Support Appellant's Position Either.

Although Appellant cited little or no authority in support of his position in the courts below, he now claims California case law supports his position. He is again wrong.

First, as noted, the *Mitchell* case does not support his position. *Mitchell's* phrase "... the entire amount actually expended for a new motor vehicle," is limited by the term

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at least the license fee portion of his annual registration fees paid. *IRS Publication 463.* So it is not entirely accurate that Appellant has received no financial benefit for these expenses.

within it, "***new*** *motor vehicle.*" It is enough to note that *post-sale/lease* "registration" payments are not incurred as part of the purchase *price* of a ***new*** *motor vehicle. Mitchell* did not address the issue in this case, but if it did, would have agreed with the Court of Appeal which cited it in support.

Likewise, *Lukather* is distinguishable. The extensive "rental car expenses" the consumer incurred were necessarily incurred due to the inoperability of his GM car due to the dangerous situation of having faulty brakes. Those expenses were essentially *incidental damages*. Significantly, *Lukather* did not address this claim under the statute at issue, and GM's argument in that case was that *Lukather* had a duty to mitigate his damages, which the court rejected. Accordingly, this case does not help Appellant.

Finally, the *Jiagbogu* case is equally distinguishable. That case also did not involve the issue of what *restitution* a prevailing buyer was entitled to under the Act. Instead, it only dealt with the issue of whether a manufacturer could also deduct an *equitable mileage offset* for continued vehicle use in addition to what the Act specifically allowed. The court said "no." Instead, the court saw no further offset for use other than what the Act clearly allowed the manufacturer.

Jiagbogu thus only dealt with the statutory interpretation of the Act's offset provision (Civil Code § 1793.2(d)(2)(C)). The Legislature has occupied that field. Nowhere did that court hold that a prevailing buyer under the Act is entitled to every penny expended for the operation, maintenance and use of a motor vehicle (plaintiff Jiagbogu himself advanced no such claims in that case) after such claim was made. Whether or not a buyer does or does not have vehicle problems does not mean such costs

would have been incurred. To the contrary, later-incurred costs for the operation of a motor vehicle were necessary regardless. Accordingly, *Jiagbogu* does not help Appellant here either.

B. THIS COURT SHOULD SUMMARILY REJECT APPELLANT'S SUBTLE ATTEMPT TO EXPAND ACT LIABILITY.

As addressed above, the two issues in this case are limited to what Appellant may recover by way of *damages* pursuant to a single Act statute pursuant to can accepted 998 Offer. Those were the only issues argued in the courts below, and they remain the only issues before this Court.

However, at several points in his Opening Brief, Appellant now asserts for the very first time the suggestion that a motor vehicle manufacturer is responsible for all vehicle costs a consumer buyer incurs *after* what he now coins a statutory "Repurchase Obligation" occurs.[15] Essentially, with little or no argument to undercut what the statute at issue means, Appellant seeks to change the argument by recharacterizing the settlement, and in so doing advocates what is essentially a sweeping expansion of both damages and *liability* under the Act. However, that is not what this case is about. This Court should summarily dismiss Appellant's obvious attempt to achieve this improper result.

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[15] It is submitted that Appellant's lengthy discussion of the Act utilizing his own self-serving terminologies was deliberately utilized to condition this Court that, what he coins a statutory "Repurchase Obligation," existed in this case which MBUSA allegedly breached, even though this was a compromise settlement with no admission of liability and no such issue was present in this case. More on this is discussed below.

First of all, none of the disputed issues in this case concerned or otherwise determined "if and when" MBUSA should have repurchased the vehicle. There is little or no factual record with respect to it, and Appellant did not focus on it in the courts below.

Second, MBUSA's accepted Offer *had no "civil penalty" component reflecting the possibility that MBUSA breached its statutory good faith obligations by not "willfully" failing to repurchase Appellant's vehicle*. Accordingly, by accepting MBUSA's offer which included no such *civil penalty* component, he admitted there was no such issue in this case.[16]

Third, MBUSA's conduct was not open for challenge. MBUSA disputed liability in its Answer, and a Code of Civil Procedure § 998 judgment does not constitute an adjudication of liability or damages. *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1004. Indeed, the statute itself provides that "any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement." C.C.P. § 998, subd. (f).

Fourth, even if this case had an unsettled *liability* component, which it does not, Appellant is really advocating an additional *punitive* assessment against MBUSA for

[16] At several points, Appellant's reference to the *Krotin* case is entirely inappropriate with respect to the issues in this case. First, his newly-minted term "Repurchase Obligation" is pure *dicta* because the plaintiffs in the *Krotin* case actually made a request for repurchase to Porsche. Accordingly, whether or not Porsche did or did not have a duty to repurchase Plaintiff's vehicle was not an issue in that case, and the instant case was resolved via a compromise settlement. Most importantly, the factual record in the instant case, and the issues which evolved from it, did not involve this demand to repurchase issue either.

failing to repurchase his vehicle sooner. Obviously, however, there is nothing in the statutory scheme which supports this sweeping new definition and purpose essentially creating a new form of liability upon manufacturers. In this regard, the Act already occupied the field in providing for *civil penalty* damages for a manufacturer's "willful" failure to abide by its statutory obligations. See Civil Code § 1794(c); *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174. So hypothetically even if such facts presented themselves and Appellant had the opportunity to claim MBUSA breached such a duty, Appellant already had this extant remedy.

Finally, again even if Appellant could assert such a claim, as discussed above, MBUSA vigorously disputes his claim that it was remiss in not repurchasing Appellant's vehicle sooner; instead, Appellant's counsel was responsible for any delay.

C. THE SECOND, "INCIDENTAL DAMAGES" ISSUE IS ALSO ONE OF CLEAR STATUTORY INTERPRETATION THAT THE COURT OF APPEAL CORRECTLY DECIDED.

In a mere four paragraphs, the Court of Appeal reasoned that statute at issue clearly and unambiguously states that post-lease/sale registration fees are not "incidental damages." (Opinion at pages 5-6.) Drawing upon the three examples the statute provided ("reasonable repair, towing, and rental car costs actually incurred by the buyer"), and despite the list being "nonexhaustive," the Court of Appeal appropriately reasoned that those specific examples provided sufficient guidance as to what constituted "incidental damage," with a "common characteristic" among them being a "cost incurred *as a result of* a vehicle being defective. *Id.* By contrast however, post-lease/sale registration fees instead represent "a standard cost of owning any vehicle." *Ibid.*

Nothing Appellant presents changes that characterization. Either these registration fees were incurred as a result of the vehicle being defective, or they were not. Nowhere does Appellant even come close to establishing he incurred those later fees "because of " this circumstance.

1. The Court Of Appeal Did Not Rewrite The Statute.

Appellant next complains that the Court of Appeal essentially "rewrote the statute" to now read "including, *and limited to the damages of a similar nature* as the following:"[17] That argument is easily dismissed because the actual examples the Legislature provided are *not* of a *similar nature* at all. No one could credibly argue that *repair* costs, *towing* costs and *rental car* costs are *similar* in nature. They are three completely different types of costs. However, to the extent that Appellant does complain that something is *similar*, it has to be that they are all *incidental damages*, as to which the courts below already correctly concluded that post-lease/sale registration costs are not.

Likewise, Appellant's further reference to unspecified and self-defined "implied warranty obligations, express warranty obligations, and warranty derivative obligation"" (whatever that means)[18] is totally inapposite, because the only issues are what Appellant was entitled to recover *as damages* under the statute per his acceptance of MBUSA's limited 998 Offer.

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[17] Opening Brief at page 55.

[18] Opening Brief at page 55.

2. Appellant's Attempt To Expand *Liability* Here Should Also Be Summarily Dismissed.

Again, this second issue only involved what MBUSA was obligated to pay Appellant pursuant to the accepted Offer. In this regard, Appellant's second attempt to morph that issue into "...[MBUSA's] failure to promptly offer to repurchase or replace the vehicle..." is, respectfully submitted, utter nonsense.[19] As has already been addressed, this latter issue was not at issue in this case, and MBUSA offered, and Appellant accepted, a settlement which did not include any *civil penalty* obligations. Likewise, the available record clearly indicates this was never an issue in this case, was never argued in the courts below, and it was raised by the Appellant for the first time only on this appeal.

Similarly, nowhere has Appellant established that his later registration fees were actually caused by a breach of warranty, or other violation of the Act. Indeed, as noted above, MBUSA disputed liability in its Answer, and a Code of Civil Procedure § 998 judgment does not constitute an adjudication of liability or damages. *Milicevich v. Sacramento Medical Center, supra,* 155 Cal.App.3d at 104. Appellant has made no evidentiary showing anywhere that any such registration fees were paid as a result of or following any breach of warranty, nor could he based on the compromised settlement he agreed to in this case.[20]

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[19] Opening Brief, p. 55.

[20] Appellant's further arguments drawing upon the "Commercial Code § 2715" are thus inapplicable. These damages are all predicated on a seller's *breach* which does not exist and was not agreed upon. Even if they were, the Act itself and case law recognizes fundamental limits on the application of the Commercial Code governing the sale of *commercial* goods between

VI.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court and the Court of Appeal.

Respectfully submitted,

DATED: July 24, 2018

UNIVERSAL & SHANNON, LLP
JON D. UNIVERSAL, ESQ.
JAMES P. MAYO, ESQ.

By: __/s/ Jon D. Universal, Esq.
Jon D. Universal
James P. Mayo

Attorneys for Respondent
Mercedes-Benz USA, LLC

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merchants in arm's length transactions from the sale of a motor vehicle to a *non-commercial* buyer. See, e.g., *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 (recognizing the distinctions between Commercial Code provisions applicable only to *commercial* transactions between merchants, thereby declining to apply and thus limited damages of *cover*, *loss of use*, *emotional distress* and other *consequential damages* in an Act case involving a *non-commercial* buyer.)

CERTIFICATE OF WORD COUNT

I, Jon D. Universal, hereby certify as follows:

I am appellate counsel for Respondent Mercedes-Benz USA, LLC. According to the word processing program I used to prepare this Brief, the Brief (excluding tables, the required statement of issues for review, this certificate, and any attachments) is 6616 words in length.

Dated: July 24, 2018

/s/ Jon D. Universal

JON D. UNIVERSAL, ESQ.

Filed 11/27/17 Kirzhner v. Mercedes-Benz CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALLEN KIRZHNER, Plaintiff and Appellant, v. MERCEDES-BENZ USA, LLC, Defendant and Respondent.	G052551 (Super. Ct. No. 30-2014-00744604) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Anderson Law Firm and Martin W. Anderson; Law Office of Jeffrey Kane and Jeffrey Kane for Plaintiff and Appellant.

Universal & Shannon, Jon D. Universal, Marie L. Wrighten-Douglass, Jay C. Patterson and James P. Mayo, for Defendant and Respondent.

This case under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq., Act), concerned an allegedly defective car which could not be repaired after multiple attempts. Plaintiff Allen Kirzhner accepted an offer of compromise pursuant to Code of Civil Procedure section 998 (998 offer) from defendant Mercedes-Benz USA, LLC, including a restitution provision identical to Civil Code section 1793.2, subdivision (d)(2)(B) (section 1793.2(b)(2)(B); all further statutory references are to the Civil Code).

The court awarded plaintiff over $47,000 in accordance with the 998 offer.

Plaintiff appealed and asserts the court erred because it denied him recovery of approximately $680 in vehicle registration renewal and certificate of nonoperation fees which he incurred in the years after he first leased the car.

We conclude the court properly determined section 1793.2(b)(2)(B) does not require payment of vehicle registration *renewal* fees and related costs incurred after the initial purchase or lease. Accordingly, we affirm.

FACTS

In June 2012, plaintiff leased a Mercedes-Benz from defendant for personal use. The complaint alleged the car came with an express written warranty covering repairs for any defects. During the warranty period, the car allegedly exhibited a variety of defects which caused the navigation system and key fob to malfunction, the steering column adjustment mechanism and power seats to be inoperative, the coolant level warning light to illuminate, and smoke to emanate from the cigarette lighter.

After bringing the issues to defendant's attention, and frustrated with defendant's supposed failure to abide by its warranty obligations, plaintiff filed suit. Among the complaint's six causes of action was one alleging defendant, following unsuccessful attempts to repair the problems, refused to promptly replace the car or pay restitution pursuant to section 1793.2. The relief sought included damages in the amount of approximately $46,800, civil penalties, and attorney's fees and costs.

Defendant filed an answer and, thereafter, made the 998 offer, which specified, in relevant part: "Pursuant to California Civil Code § 1793.2(d)(2)(B), in exchange for the subject vehicle, [defendant] offers to make restitution in an amount equal to the actual price paid or payable by the Plaintiff, including any charges for transportation and manufacturer-installed options, but excluding non-manufacturer items installed by a dealer or the Plaintiff, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under [Civil Code] Section 1794, including, but not limited to, reasonable repair, towing, and rental costs actually incurred by [plaintiff], less a reasonable mileage offset in accordance with Civil Code Section 1793.2(d)(2)(C), all to be determined by court motion if the parties cannot agree." Plaintiff accepted the 998 offer, and the court entered judgment accordingly.

The parties were unable to agree on an amount due under the above-listed provision of the 998 offer, so plaintiff filed a motion requesting the court to make the determination. Plaintiff claimed he was entitled to just under $55,000, including $680 in registration renewal fees he paid in the years 2013 and 2014, and an anticipated 2015 payment for a certificate of nonoperation. Defendant opposed the motion largely due to the amount plaintiff requested. It asked the court to award about $45,500.

Because the 998 offer referenced and included the language of section 1793.2(d)(2)(B) set out above, the trial court focused on amounts recoverable as restitution under that statute. Following a hearing, the court determined plaintiff was entitled to approximately $47,700, and entered an order accordingly. The amount awarded excluded the $680 associated with the 2013 and 2014 vehicle registration renewal fees and the 2015 certificate of nonoperation fee. The court explained the "registration fees" mentioned in the statute "do not include all registration fees that a buyer pays over the course of the lease[,]" but instead are limited to fees paid in conjunction with the original purchase or lease transaction.

DISCUSSION

Plaintiff's sole contention on appeal concerns the denied recovery of his $680 vehicle registration renewal and certificate of nonoperation fees. He claims the court erred in interpreting section 1793.2(d)(2)(B). We disagree.

As with any statutory interpretation issue, we begin with the words of the statute to ascertain the intent of the Legislature. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) "[T]he Act 'regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties. [Citations.] . . . '[T]he Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.' [Citation.]" (*Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1486.)

"Section 1793.2 is part of a statutory scheme similar to laws enacted in many other states, commonly called 'lemon laws.' [Citations.]" (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 35 (*Mitchell*).) It requires a "manufacturer or its representative" who "is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, . . . [to] either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer in accordance with subparagraph (B) . . . ." (§ 1793.2, subd. (d)(2).) In turn, subparagraph (B) states, "the manufacturer shall make restitution in an amount equal to the *actual price paid or payable by the buyer*, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and *including any collateral charges such as* sales tax, license fees, *registration fees*, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer." (§ 1793.2, subd. (d)(2)(B), italics added.)

Plaintiff argues the term "registration fees" means all vehicle registration fees whenever paid, including registration renewal fees. We are not persuaded. The wording and structure of the statute dictate otherwise. In defining the amount of restitution, subparagraph (B) specifies it shall be equal to "the actual price paid or payable by the buyer." (§ 1793.2, subd. (d)(2)(B).) All language thereafter simply clarifies the meaning of that phrase by listing items which must be accounted for, and excluded from, the calculation. Among the items to be included are "collateral charges[,]" which is the category within which registration fees fall. The only registration fee that could be considered a "collateral charge" associated with "the actual price paid or payable" is the one which is paid when the vehicle is purchased or leased (or accounted for in financing). (See *Mitchell, supra*, 80 Cal.App.4th at p. 37 ["[T]he Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute"].) Registration fees for future years cannot be considered a "collateral charge" because they are incurred and paid after the initial purchase or lease.

Plus, the statute's use of the word "payable" does not mean the Legislature intended all registration renewal fees to be recoverable as part of restitution. It is simply a recognition that many buyers do not pay the full amount due at the actual time of the original transaction. Instead, and for various reasons, car buyers obtain financing which allows them to make installment payments. (*Mitchell, supra*, 80 Cal.App.4th at p. 38.) If the phrase "or payable" was not included in the statute, those types of buyers would only receive restitution for the amount already paid, leaving them liable for all future financing payments. Such a result would be contrary to the statute's remedial purpose.

Plaintiff next argues the fees at issue should be considered "'incidental damages.'" Not so. The statute provides examples of incidental damages specific to the defective vehicle context, which includes "reasonable repair, towing, and rental car costs actually incurred by the buyer." (§ 1793.2, subd. (d)(2)(B).)

Although the list is nonexhaustive, the examples give guidance as to what constitutes an "incidental damage." The common characteristic among them is each would be a cost incurred *as a result of* a vehicle being defective. Such is not the case with vehicle registration renewal fees, which are more accurately characterized as a standard cost of owning any vehicle. Were we to adopt plaintiff's interpretation, it would open up a "Pandora's box" of potential costs for which a defendant would need to pay restitution in these types of cases (e.g., costs for gas, car washes, oil changes). Plaintiff provides no authority for such an expansive interpretation.

In sum, the trial court properly concluded the restitution payable under section 1793.2 does not include vehicle registration *renewal* fees, as opposed to vehicle registration fees associated with the purchase of a vehicle.

DISPOSITION

The order is affirmed. Respondent is entitled to its costs on appeal.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.

Court of Appeal, Fourth Appellate District, Division Three
Kevin J. Lane, Clerk/Administrator
Electronically FILED on 12/13/2017 by Debra Saporito, Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALLEN KIRZHNER, Plaintiff and Appellant, v. MERCEDES-BENZ USA, LLC, Defendant and Respondent.	G052551 (Super. Ct. No. 30-2014-00744604) ORDER CERTIFYING OPINION FOR PUBLICATION

Association of Southern California Defense Counsel, Bowman and Brooke, and Civil Justice Association of California requested that our opinion, filed on November 27, 2017, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c).

The request for publication is GRANTED. The opinion is ordered published in the Official Reports.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF PLACER

I am employed in the County of Placer, State of California. I am over the age of 18 and not a party to the within action. My business address is 2240 Douglas Blvd., Suite 290, Roseville, California 95661.

ELECTRONICALLY: On the date indicated below, I served the document electronically by sending it by electronic mail to the email address(es) indicated below. The transmission was reported complete and without error by my email provider. Pursuant to Rules of Court, Rule 2.251(a)(2)(B), a party consents to electronic service when that party electronically files any document with the Court.

Document(s) Served:

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I declare under penalty of perjury under the laws of the State of California and of my own personal knowledge that the above is true and correct.

Signature: /s/ EMILY C. BURNS