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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TAMMY SWANN, Plaintiff and Respondent, v. DAIMLERCHRYSLER MOTORS CORPORATION, Defendant and Appellant.	D038170; D039277 (Super. Ct. No. GIC743976)

APPEAL from a judgment and order of the Superior Court of San Diego County, Janis Sammartino, Judge. Affirmed. Sanctions imposed for a frivolous motion to dismiss the appeal.

DaimlerChrysler Motors Corporation (Chrysler) appeals a judgment following trial that awarded Tammy Swann damages under the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, § 1790 et seq.)[1] for a failure to repair a used car she

1 All statutory references are to the Civil Code unless otherwise specified.

bought from Chrysler. The damages included reimbursement for the cost of the car, a civil penalty, and attorney fees. Chrysler contends the trial court erred in instructing the jury that a "personalized service contract" (contract) Swann purchased at the time she bought the car was an "express warranty" within the meaning of the Song-Beverly Act entitling Swann to a reimbursement/replacement remedy, and challenges the sufficiency of the evidence to support the award of a civil penalty. Chrysler also appeals an order awarding attorney fees following the jury's verdict and argues that if we reverse the judgment, we should also reverse the attorney fee award.

Swann brought a motion to dismiss the appeal on the basis this case was a limited civil case that should have been appealed to the appellate division of the superior court and not to this court. Chrysler argues that Swann's motion to dismiss was frivolous and seeks an award of sanctions.

We conclude the appeal was properly filed in this court and Swan's motion to dismiss was a frivolous motion. Therefore, we deny the motion to dismiss and award sanctions to Chrysler. We affirm the judgment awarding damages to Swann and affirm the order awarding attorney fees.

FACTS

In 1999 Swann and her fiancé purchased a 1996 Plymouth Neon from a Dodge dealer. The car had been driven approximately 32,000 miles at the time of purchase and was still covered by Chrysler's basic three-year/36,000 express warranty. At the time of sale, the salesman recommended Swann also purchase an extended warranty or service

contract. Swann did so; she bought the contract for $995, which covered the car for two years or 24,000 miles.

The contract explained what vehicles were eligible for coverage: "Current model year and eight (8) immediately preceding model year vehicles specified by us with no more than 80,000 miles of service are eligible for this Plan. The Plan must be purchased at the time of vehicle sale or within the 3 month/3,000 mile Limited Warranty period." The contract states that it "protects [the buyer] against major repair bills should a component covered by the Plan fail in normal use." The contract required the payment of a $50 deductible for each visit. Also contained in the contract was the following statement:

> "IMPORTANT! The maximum reimbursable amount should a covered component fail will be THE TOTAL COST OF THE REPAIRS, PER VISIT, LESS THE DEDUCTIBLE, OR IF LESS, THE CASH VALUE OF THE VEHICLE! The cash value of the vehicle will be determined by the average retail value as listed in the current NADA Used Car Pricing Guide. In situations where the repairs costs exceed the cash value of the vehicle, the remainder of the Plan coverage will be canceled."

Swann first sought repair on her car on April 29, 1999, after expiration of the three-year/36,000 mile original warranty; her mileage was 37,361. She complained of loud clicking noises coming from the front end as well noise associated with the steering wheel. She was told the parts would be ordered and she returned on May 4, 1999, at which time the dealership replaced some exhaust manifold gaskets. In August and September 1999, Swann brought in the car for oil leaks and a squeaky steering wheel. The dealership made various repairs.

On January 5, 2000, Swann brought the car in for a fifth time, with its mileage at 45,819 miles. She complained the transmission was slipping, the car would stick in one gear and the automatic shift was not working properly. The dealer adjusted the throttle cable but this did not solve the problem. Additionally, Swann complained of continuing loud clicking or popping noises from the front end. The dealer told Swann that he could not duplicate the noises.

Five days later, on January 10, 2000, Swann returned for a sixth visit, concerned about the transmission taking too long to shift and the popping noises. She drove the car with an employee of the dealership, pointing out the noise, but the dealer did not believe there was a problem with the car or with the transmission.

On January 17, 2000, Swann returned for a seventh visit because the popping was still continuing and the transmission was continuing to slip. The dealer replaced some parts. Swann picked up her car two days later on January 19 and immediately returned the car to the dealer; the popping noises had occurred while she was driving home. The dealer replaced some parts but the problems continued. Swann was afraid to drive the car more than absolutely necessary.

On January 31, 2000, Swann, through an attorney, requested a refund under the Song-Beverly Act, a request that was rejected by Chrysler. Thereafter, on February 24, 2000, Swann filed a complaint in superior court alleging Chrysler had not complied with its obligation under the Song-Beverly Act to repurchase her car after failing to make necessary repairs. She sought a civil penalty for Chrysler's willful failure "to comply with its obligations" under the Song-Beverly Act.

On March 3, 2000, Swann returned to the dealer for a ninth and final time because the transmission was not properly shifting. The dealer replaced the transmission.

At trial, Swann's expert testified Chrysler had issued several "technical service bulletins" concerning the popping and clicking noises that Swann had heard. The expert heard the noises during a short test drive that was videotaped and played to the jury. He believed the noises indicated problems in two areas: (1) in the "constant velocity joints," which were part of the drive axle, and appeared to be failing or had already failed; and (2) in the "knuckle assembly" of the front suspension, a problem that had been addressed in three technical service bulletins. The expert stated that the axle problem was a serious safety concern. If the axle failed completely, it would result in an inoperable condition on the road and possibly an "ugly situation"; a spinning broken axle could "beat the floor pan right into your feet." The expert testified that none of the repairs suggested in the technical service bulletins for the repair of the knuckle assembly of the front suspension had been attempted on Swann's car. He testified this problem also raised safety concerns since a wheel bearing failure could leave the wheel "flopping all over the place."

Chrysler's expert testified he could not duplicate the noises during his inspection, but agreed some problems are intermittent. He conceded that during the videotape of the test drive taken by Swann's expert there were unusual noises coming from the car but attributed them to a different source that would not involve a defective component.

Over Chrysler's objection, the trial court instructed the jury that "[a] service contract sold for an additional fee in conjunction with the sale of a used vehicle, is an

'express warranty.'"[2] Pursuant to the parties' stipulation, the jury was instructed that Swann's restitution damages were $14,844.92. The jury was instructed they could award a civil penalty of up to twice the amount of Swann's restitution damage if they found Chrysler's failure to repurchase her vehicle was "willful" because "it knew of its obligations under the law but intentionally declined to fulfill them."

The jury found that Swann's vehicle suffered a "'nonconformity' to warranty"; that Chrysler failed to repair the nonconformity within a reasonable number of attempts; and assessed a civil penalty against Chrysler of $7,500. The total judgment in favor of Swann was $22,344.92 plus costs and interest and an award of attorney fees.

DISCUSSION

I

Dismissal of Appeal

Swann contends this is a "limited civil case" that should have been appealed to the appellate division of the superior court and that Chrysler's notices of appeal were not timely filed given the shorter time limits for appeals to the appellate division of the superior court. (See Code Civ. Proc., §§ 904.1, 904.2; Cal. Rules of Court, rules 2, 3, 122(a), 123(a).) Swann's argument is based solely on an assertion that since Code of

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2 The complete instruction stated: "An 'express warranty' is a written statement arising out of the sale of a consumer good pursuant to which the manufacturer, distributor or retailer undertakes to preserve or maintain the utility or performance of the consumer good or to provide compensation if there is a failure in utility or performance. [¶] A service contract sold for an additional fee in conjunction with the sale of a used vehicle, is an 'express warranty.' [¶] In this case, the plaintiff is a covered party under the defendant's service contract."

Civil Procedure section 85 defines a "limited civil case" as one where the amount in controversy "exclusive of attorneys' fees, interest, and costs" does not exceed $25,000 and since the complaint did not specify the amount in controversy and the jury awarded less than $25,000 (exclusive of attorney fees, interest, and costs), therefore this case is a limited civil case. Chrysler contends that Swann's argument and motion to dismiss is frivolous and justifies an award of sanctions. We agree with Chrysler.

Prior to the unification of the courts, a case whose amount in controversy did not meet the jurisdictional minimum was subject to a transfer of jurisdiction from the superior court to the municipal court. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 264.) As a result of the unification of the courts, the municipal courts have been eliminated. (*General Electric Capital Auto Financial Services, Inc. v. Appellate Division* (2001) 88 Cal.App.4th 136, 141, fn. 1.) Now, the superior court has original jurisdiction over a limited civil case and the statutory scheme authorizes a "reclassification" of a case that is erroneously classified. (Code Civ. Proc., § 403.040, subd. (a).)

Here, while it is true that the complaint does not specify the amount of damages sought, the record is clear that Swann herself placed into controversy an amount greater than $25,000. In her trial brief, Swann indicated she was seeking $45,163.71 (actual damages of $15,054.57 plus a civil penalty of $30,109.14). She argued to the jury that they should award $14,844.92 in compensatory damages, plus twice that amount as a civil penalty ($29,689.84), i.e., that they should award damages exceeding $43,000, and the jury was so instructed so that they could award the amount sought by Swann. Had

this case been a limited civil case, Swann's damages would have been limited to $25,000 and the jury would have been instructed on the $25,000 limit.

Additionally, as Chrysler points out, the case below was not treated by the parties or the court as a limited civil case, e.g., the amount of the filing fees paid were inconsistent with a limited civil case (see Gov. Code, §§ 72055, subd. (a) [filing fee for first paper in a limited civil case is either $83 or $90, whereas the filing fee stamped on Swann's complaint is $191], 72056 [filing fee in a limited civil case for a first paper by a party other than the plaintiff is $80, whereas Chrysler's answer reflects a filing fee of $188]); and the captions on the pleadings did not state it was a limited civil case (see Code Civ. Proc., § 422.30, subd. (b) ["In a limited civil case, the caption shall state that the case is a limited civil case, and the clerk shall classify the case accordingly"]; see also Cal. Rules of Court, rule 201(f)(10) ["In the caption of every pleading and every other paper filed in a limited civil case, the words: 'Limited Civil Case,' as required by Code of Civil Procedure section 422.30(b)" must appear]).

Moreover, we note that Swann is raising the issue of reclassification of this case to a limited civil case for the first time on appeal. The Code of Civil Procedure indicates that a plaintiff should generally make a motion to reclassify "within the time allowed for that party to amend the initial pleading" and if the plaintiff fails to make the motion within that time period, the plaintiff is entitled to reclassification only if the case was incorrectly classified and the plaintiff presents good cause for not earlier seeking reclassification. (Code of Civ. Proc., § 403.040, subds. (a), (b).) Here, Swann did not make a motion for reclassification in the superior court; indeed, she proceeded to try the

case on the basis the case exceeded the jurisdictional $25,000 limit and did not raise the issue in the trial court following the jury's award of less than $25,000. Seeking reclassification for the first time in this court, after the time limits have expired for an appeal to the appellate division of the superior court, clearly does not comport with the requirements of the Code of Civil Procedure nor with the general rules of appellate practice regarding what issues may be raised for the first time on appeal. Further, even if such reclassification were statutorily permissible on appeal, Swann has clearly failed to meet the requirement of Code of Civil Procedure section 403.040, subdivision (b)'s requirement of a showing of good cause to justify her failure to earlier seek reclassification.

Chrysler requests sanctions be imposed for a frivolous motion. (See *Dana Commercial Credit Corp. v. Ferns & Ferns* (2001) 90 Cal.App.4th 142, 147 ["this court has the inherent authority to impose sanctions for the filing of a frivolous *motion* on appeal, and will exercise its discretion to do so upon an appropriate showing"].) Sanctions for a frivolous motion are appropriate if any reasonable attorney would agree that the motion is totally and completely without merit. (See *id*. at pp. 146-147; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648.)

Here, Chrysler, prior to filing its opposition, pointed out to Swann's counsel not only the various inconsistencies in the record of the case with her theory that the case was a limited civil case (e.g., the amount of the filing fees paid and the lack of any caption denominating the case as a limited civil case) but also the fact that Swann herself had sought more than $25,000 from the jury. Swann's counsel refused to withdraw the

motion. Given that there is nothing in the record that is consistent with the parties or the court ever intending this to be a limited civil case, that Swann herself put more than $25,000 into controversy by seeking recovery of over $43,000, and that the requirements of the Code of Civil Procedure requiring a timely motion to reclassify be made in the superior court, we believe no reasonable attorney would have believed that upon the jury's rejection of part of Swann's claims, this case suddenly was transformed into a limited civil case required to be appealed to the appellate division of the superior court instead of this court.

We conclude Swann's motion to dismiss the appeal was a frivolous motion and that Chrysler is entitled to its costs and attorney fees in responding to her motion to dismiss.

II

Service Contract as an Express Warranty

Chrysler contends the trial court erred in determining its contract was an express warranty under the Song-Beverly Act and that, therefore, Swann was entitled to have Chrysler repurchase her car.

A. *Provisions of the Song-Beverly Act*

The term "express warranty" is defined in the Song-Beverly Act as including "[a] written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance . . . ." (§ 1791.2, subd. (a)(1).) The Song-Beverly Act provides

that "[i]t is not necessary to the creation of an express warranty that formal words such as 'warrant' or 'guarantee' be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty." (§ 1791.2, subd. (b).) "'Consumer goods'" is defined as "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." (§ 1791, subd. (a).)[3] Additionally, notwithstanding the general definition of "consumer goods" as meaning "new" goods, the Song-Beverly Act provides for express warranties given by a retailer or distributor on *used* consumer goods. (§ 1795.5.)

The term "service contract" is also defined in the Song-Beverly Act as "a contract in writing to perform, for an additional cost, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of a consumer product, except that this term does not include a policy of automobile insurance, as defined in Section 116 of the Insurance Code." (§ 1791, subd. (*o*).) A service contract may be sold to a buyer "in addition to, or in lieu of, an express warranty if that contract fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract." (§ 1794.4, subd. (a).) "Except as otherwise expressly provided in the service contract, every service contract shall obligate the

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[3] "'Consumer goods'" also includes "new and used assisstive devices sold at retail." (§ 1791, subd. (a).)

service contract seller to provide to the buyer of the product all of the services and functional parts that may be necessary to maintain proper operation of the entire product under normal operation and service for the duration of the service contract and without additional charge." (§ 1794.4, subd. (b).) A service contract on a motor vehicle may not be sold if it covers the same items, costs or time periods as the express warranty; a service contract may run concurrently with an express warranty only if the service contract "covers items or costs not covered by the express warranty" or "provides relief to the purchaser not available under the express warranty, such as automatic replacement of a product where the express warranty only provides for repair." (§ 1794.41, subd. (a)(3)(A) & (B).) The Song-Beverly Act regulates what must be disclosed in a service contract (e.g., the duration of the contract), what is covered by the contract, procedures the buyer must follow in order to obtain service or repair of the product, and the buyer's rights to cancel the service contract. (§ 1794.4.)

Section 1794 of the Song-Beverly Act generally covers actions for the recovery of damages by a buyer. In part, section 1794 provides:

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

Additionally, section 1794 authorizes a civil penalty of up to two times the amount of actual damages if the buyer establishes the failure to comply with the Song-Beverly

Act provisions was willful (*id.*, subd. (c)) and for an award of attorney fees to a prevailing buyer (*id.*, subd. (d)).

Section 1794 refers to a remedy of replacement or reimbursement set forth in section 1793.2, subdivision (d), which provides:

> "(d)(1) Except as provided in paragraph (2) [not pertinent here], 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 in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.
>
> "(2) 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 in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle." (Italics added.)

B. *Reveles Decision: Application of the Song-Beverly Act to a Service Contract Sold with a Used Car*

The trial court, in ruling that the contract here was an express warranty entitling Swann to the replacement or reimbursement remedy specified in section 1793.2, subdivision (d), relied on our decision in *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139 (*Reveles*), disapproved on other grounds in *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, footnote 6.

In *Reveles*, we held that a "'vehicle service agreement,'" sold for an additional fee in conjunction with the sale of a used vehicle, was an "'express warranty'" under the Song-Beverly Act. (57 Cal.App.4th at p. 1145.) In *Reveles*, the buyer purchased a used Nissan pickup truck from a Toyota dealer. The salesman assured the buyer that the truck was in perfect condition and had the manufacturer's original parts. After the sale was negotiated, for the first time the dealer stated the truck was being sold "'as is'" so the buyer also purchased a two-year/24,000 mile "'vehicle service agreement'" providing "'for the repair of mechanical failures of specified parts,'" including the axle assembly, steering and suspension components. (*Ibid*.) Two months later, the truck's front end suddenly dropped while the buyer was driving the truck. The truck was towed to Toyota's facility where a mechanic told the buyer the truck "had "'too much [preexisting] frame damage to repair."'" (*Ibid*.) The buyer demanded a replacement or refund, which was refused, the dealer's manager telling the buyer """the truck will be fixed."'" (*Ibid.*) An upper arm bracket was replaced, but the truck was still "unsafe to drive due to frame cracks and very dangerous steering characteristics." (*Ibid*.) The buyer surrendered the truck to the lender. (*Ibid*.)

In *Reveles* we noted on the one hand that section 1794, which generally provides for remedies including attorney fees under the Song-Beverly Act, by its terms applies only to the buyer of "consumer goods," which under the Act is generally defined to mean *new* goods. (See § 1791, subd. (a).) On the other hand, section 1795.5 imposes requirements on the seller of *used* goods, but those requirements are only on sales for "which *an express warranty* is given." Thus, we found there was an anomaly in the

statutory scheme such that if it was narrowly construed, the Song-Beverly Act would provide no remedies, including the recovery of attorney fees, for breach of a service contract sold with the purchase of a nonconforming used vehicle. We found such a construction conflicted with the Legislature's intent. We explained:

> "If 'express warranty' under section 1795.5 is interpreted to exclude the vehicle service agreement, Reveles has no Song-Beverly Act remedy for Toyota's breach of sections 1794.4, subdivisions (b) and (d)[4] and 1796.5,[5] and they would thus be rendered meaningless. In enacting the Song-Beverly Act and amending it over the years, the Legislature's intent was to eliminate misleading 'sales gimmicks,' and to ameliorate consumer frustration caused by inability to obtain promised repair services. The Song-Beverly 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.]' [Citation.] Accordingly, we conclude that a written service contract covering a used vehicle, under which the dealer 'undertakes to preserve or maintain the utility or performance' of the vehicle, is an 'express warranty' under section 1795.5, even though the consumer is required to pay additional consideration for the promised services. Thus, Reveles's Song-Beverly Act claim has merit. Certainly, it was gravely misleading for Toyota to promise repair services when the truck was damaged beyond repair at the time of sale." (*Reveles, supra,* 57 Cal.App.4th 1139, 1157-1158, fn. omitted.)

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4 Section 1794.4, subdivision (b) generally obligates the service contract seller to provide the buyer with all of the services and parts necessary to maintain proper operation of the product under normal operation for the duration of the service contract and without additional charge. Subdivision (d) makes subdivision (b) applicable to all service contracts entered into as to new and used products (other than on home appliances and home electronic products) on and after July 1, 1991.

5 Section 1796.5 provides: "Any individual, partnership, corporation, association, or other legal relationship which engages in the business of providing service or repair to new or used consumer goods has a duty to the purchaser to perform those services in a good and workmanlike manner."

Thus, the *Reveles* decision held a service contract sold with a used vehicle was an express warranty for purposes of the Song-Beverly Act and was allowed the award of attorney fees to the prevailing buyer.

C. *Analysis*

We believe *Reveles* was correctly decided and its reasoning is applicable in this case. Pursuant to the reasoning of the *Reveles* decision, we conclude the contract here was an express warranty for purposes of the remedies provided in the Song-Beverly Act, including the remedy of reimbursement.

Chrysler argues that the *Reveles* decision is distinguishable both because Swann's car had some period of time remaining on the original three-year/36,000 miles warranty and because *Reveles* addressed a different issue, i.e., the availability of attorney fees under the Song-Beverly Act, rather than the reimbursement/replacement remedy.

As did the court in *Reveles*, we conclude that the contract here clearly meets part of the definition of an express warranty since it unquestionably required Chrysler to "preserve or maintain the utility of performance" of the used car for a specified period of time. We also agree with *Reveles*'s analysis that this written statement arose out of the sale of the vehicle. Further, we note there are additional circumstances in this case that support construing this contract as an express warranty. The contract was only available to be purchased at the time the vehicle was purchased or within the short warranty period given with the sale of a used vehicle. In other words, purchase of the contract had to be made essentially contemporaneously or within a short time after the sale. The contract, furthermore, was included on the bill of sale for the vehicle. The fact that the contract

was tied so closely to the sale, not only in this case, but as a general matter of availability, is a factor tending to support a finding that the contract was in the nature of an express warranty, i.e., "[a] written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance . . . ." (§ 1791.2, subd. (a)(1).)

Chrysler attempts to draw a distinction based on the fact that Swann's car had some time remaining under the original three-year/36,000 mile warranty at the time of sale and issuance of the contract whereas in *Reveles* the truck had no coverage remaining under the original warranty. In both cases, the written statements were issued at the time of sale of the used vehicles and constituted promises to preserve the utility of the vehicles. The fact that Swann's contract period did not commence immediately on purchase but a short time later was only the result of the existence of an express warranty covering the initial period of her ownership. Nothing in the reasoning of the *Reveles* decision supports a conclusion that *Reveles*'s analysis of the Song-Beverly Act or its conclusion would have been different if Reveles's truck had been sold with some time remaining on the original warranty. We find Chrysler's distinction to be of no significance and not a basis for distinguishing the *Reveles* decision.

It is true, as Chrysler points out, that *Reveles* addressed a different issue, i.e., the availability of attorney fees pursuant to section 1794, subdivision (d) of the Song-Beverly Act, but the anomaly in the statutory scheme recognized in *Reveles* exists not only as to the attorney fee provision of section 1794, subdivision (d) but in the entirety of section

1794 remedies since section 1794 refers only to buyers of "consumer goods," and an exception to the definition of consumer goods as being *new* goods applies only to an express warranty given in connection with the sale of *used* goods pursuant to section 1795.5. We believe the reasoning of the *Reveles* case is sound and is applicable to the situation here.

Chrysler criticizes the *Reveles* decision, arguing that it ignored statutory language and legislative history indicating that service contracts were to be treated differently from express warranties and that remedies for breaches of service contracts are generally to be left to the terms of the contractual agreement. For example, Chrysler points out that the Song-Beverly Act contains distinct definitions for express warranties and service contracts[6] and that the Song-Beverly Act provides that "[n]othing in this chapter shall be construed to prevent the sale of a service contract to the buyer in addition to or in lieu of an express warranty if that contract fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of that contract . . . ." (§ 1794.4, subd. (a).) As we have pointed out above, however, the definition of an express warranty is broad enough to encompass the contract in this case. Further, we

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6 An express warranty is defined as: "A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance . . . ." (§ 1791.2, subd. (a).) A service contract is defined as: "a contract in writing to perform, for an additional cost, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of a consumer product except that this term does not include a policy of automobile insurance, as defined in Section 116 of the Insurance Code." (§ 1791, subd. (*o*).)

note that *Reveles*, after examining the statutory scheme, rejected the argument made by Chrysler. We find *Reveles*'s reasoning to be persuasive.

As to the legislative history of the Song-Beverly Act, Chrysler, for example, cites the legislative history of 1985 amendments to the Song-Beverly Act, which addressed problems experienced by car buyers who were not given a copy of a service contract prior to purchase and were unable to cancel the contract when their vehicle was destroyed during the contract period. The Legislature amended sections 1791, 1794.4 and added section 1794.41, thereby imposing additional disclosure and cancellation provisions as to service contracts. (Stats. 1985, ch. 1047, §§ 1-3, pp. 3461-3464.) In particular, Chrysler focuses on comments in the legislative history, noting that existing law did not regulate service contracts and the proposed legislation did not provide any remedies for violations of its requirements.[7] Chrysler also focuses on the 1987 amendment to section 1794,

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[7] See Assembly Consumer Protection Committee report on Assembly Bill No. 2285, as amended April 15, 1985, which suggested technical amendments ["The bill doesn't provide specific remedies for violations of its requirements and the remedy provision of the Song-Beverly . . . Act . . . would not seem to be relevant for such violations"]; Senate Insurance, Claims and Corporations Committee report on Assembly Bill No. 2285, as amended June 27, 1985, Staff Comments ["Penalties for violation of this measure are not specified in the bill nor is the enforcement agency and its responsibility for enforcing the bill detailed"]; Enrolled Bill report, State and Consumer Services Agency, Assembly Bill No. 2285, Bill Summary ["Existing law regulates implied and express warranties on consumer goods, including motor vehicles, sold in California. Existing law does not specifically regulate service contracts on consumer goods, other than to require that all of the terms and conditions be disclosed in the contract. [¶] This bill would require motor vehicle service contracts to contain specified disclosures; to be cancelable by the buyer; to be available for inspection prior to purchase, and to be delivered to the buyer within 60 days after purchase"].

made as part of a number of changes to the Song-Beverly Act. The amendment of section 1794 deleted the stricken text and added the italicized text:

> "(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
>
> "(b) The measure of the buyer's damages in an action under this section shall ~~be as follows~~ *include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following*: . . . ." (Stats. 1987, ch. 1280, § 4, p. 4562.)

In enacting this amendment, the Legislature declared: "The amendment of subdivision (b) of Section 1794 of the Civil Code made at the 1987-1988 Regular Session of the Legislature does not constitute a change in, but is declaratory of, existing law." (Stats. 1987, ch. 1280, § 9, p. 4567.) Chrysler argues this legislative history shows the Legislature did not intend to extend the repurchase/replacement remedies to service contracts and implied warranties, but was only attempting "to clarify that a vehicle owner can bring a private right of action to obtain replacement or repurchase under [section] 1793.2 *when that section applies* — i.e., when there has been a failure to conform a vehicle to an *express warranty*" and not a service contract. Chrysler points out that prior to the 1987 amendment, an automobile manufacturer had argued (unsuccessfully) in court that a buyer could sue only for the remedies specifically enumerated in section 1794 and not for the replacement/reimbursement remedy that was enumerated only in section 1793.2.

While we agree that there is legislative history consistent with Chrysler's position, we also note there is no legislative history clearly indicating the Legislature specifically

intended to deny the reimbursement/replacement remedy in the case of a service contract or extended warranty sold with a used vehicle. The legislative history is, at best, ambiguous and does not preclude the result reached in *Reveles* or in this case. Significantly, the Legislature did not amend the Song-Beverly Act following the 1997 decision in *Reveles* so as to overrule that decision. Had the Legislature disagreed with *Reveles*'s interpretation that a service contract sold with the purchase of a used vehicle is an express warranty within the meaning of the Song-Beverly Act, the Legislature could have easily amended the Act to overrule the *Reveles* decision. They did not do so. As pointed out in the legislative history materials submitted by Chrysler, following the *Reveles* decision, the Legislature made only a minor amendment to the definition of "service contract" so as to clarify that a service contract could provide for replacement of a product in addition to repair or maintenance. (Stats. 1998, ch. 196, § 2, pp. 754-755.)

Finally, we note the Song-Beverly Act "is a remedial measure intended for the protection of consumers and should be given a construction consistent with that purpose." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 ["the Song-Beverly Act is strongly pro-consumer"].) Resolving the ambiguities in the statutory language and in the legislative history in favor of allowing Swann the remedy of reimbursement comports with the purpose of the Song-Beverly Act.

We conclude that the reasoning of *Reveles* applies here; the service contract in this case was an express warranty entitling Swann to the remedy of reimbursement.

No reversal is merited on the ground the court incorrectly instructed the jury that the service contract here was an express warranty.

III

Civil Penalty

Chrysler contends there was insufficient evidence to support the jury's verdict that it willfully failed to comply with an obligation to repurchase or replace Swann's vehicle and that therefore the civil penalty of $7,500 must be reversed.[8] Chrysler contends that, as a matter of law, the record establishes it acted in good faith and had a reasonable belief it was complying with the requirements of the Song-Beverly Act.

The civil penalty provision of section 1794, subdivision (c) "is important as a deterrent to deliberate violations. Without such a provision, a seller or manufacturer who knew the consumer was entitled to a refund or replacement might nevertheless be tempted to refuse compliance in the hope the consumer would not persist, secure in the knowledge its liability was limited to refund or replacement. Any interpretation that would significantly vitiate the incentive to comply should be avoided." (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184.) "[T]he penalty under section 1794[subdivision](c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. . . . Neither

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8 We note that Swann in her reply brief has failed to address Chrysler's argument that, as a matter of law, there was insufficient evidence to support imposition of a civil penalty. We decline to treat Swann's failure to address this issue as a concession that Chrysler is correct.

punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.'" (*Id*. at pp. 184-185, quoting from *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997.)

Chrysler relies on a case (*Gavaldon v. DaimlerChrysler Corp.* (2002) 95 Cal.App.4th 544, review granted May 15, 2002, S104477) where the court agreed with Chrysler's position that a buyer was not entitled to a replacement/reimbursement remedy when the used car was purchased with some time remaining on the original warranty, but the replacement/reimbursement remedy was sought after the expiration of the original warranty and during a period of a service contract. Chrysler argues that because that court agreed with its position, then, as a matter of law, it follows that Chrysler's belief it was complying with the requirements of the Song-Beverly Act in denying a reimbursement/replacement remedy was reasonable.

Initially, we note that review has been granted in the case on which Chrysler relies. Second, at the time Chrysler made its decision to deny Swann the reimbursement remedy, the only pertinent published case was *Reveles*, which held that a service contract sold with a used vehicle constituted an express warranty for the purposes of the Song-Beverly Act. The state of the law was not such as to support a conclusion, as a matter of law, that Chrysler's belief it was complying with the requirements of the Song-Beverly Act in denying a reimbursement remedy was reasonable.

Moreover, here the jury was fully instructed on the applicable standard, including that it could not impose a civil penalty if it found Chrysler's "failure to repurchase or replace plaintiff's vehicle was the result of a good faith and reasonable belief that the facts and/or the law imposing the statutory obligation were not present." Chrysler raises no objections to these instructions and we find them to be a correct statement of law. The jury here also was provided with evidence and argument as to the state of the law, including the *Reveles* decision. Additionally, there was evidence and argument as to whether Swann's car had a nonconformity so as to give rise to any right to repair or replacement. In other words, the jury here was fully presented with the relevant evidence (including the pertinent statutory and case law) and with proper instructions in order to resolve the factual question as to whether Chrysler had acted in good faith in denying Swann's request for reimbursement. (Contrast *Kwan v. Mercedes-Benz of North America, Inc., supra,* 23 Cal.App.4th 174, where the jury was misinstructed on the meaning of the term "willful" and was not given an opportunity to consider whether the defendant acted in good faith in denying a reimbursement/replacement remedy.) The jury was presented with sufficient evidence to conclude that Chrysler had not acted in good faith and a reasonable belief it was complying with the requirements of the Song-Beverly Act.

No reversal is merited on this ground.

DISPOSITION

The judgment and order are affirmed. Chrysler is entitled to recover its attorney fees in defending against Swann's motion to dismiss as a sanction for a frivolous motion.

KREMER, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.