WISCONSIN COURT OF APPEALS
DISTRICT II

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent,

v. Appeal No. 2009AP000538

MERCEDES-BENZ USA, LLC, and
DAIMLER CHRYSLER FINANCIAL
SERVICES AMERICAS, LLC,
d/b/a Mercedes-Benz Financial,

Defendants-Respondents-Cross-Appellants.

Appeal from the Circuit Court for Waukesha County,
the Honorable Ralph M. Ramirez, Circuit Court Judge,
Presiding
Circuit Court Case No: 2007-CV-1869

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS MERCEDES-BENZ USA, LLC, AND MERCEDES-BENZ FINANCIAL

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Standard of Review: *de novo*.

2. Did the trial court err in determining that attorneys' fees do not constitute "pecuniary loss" under the Lemon Law, Ch. 218?

Standard of Review: *de novo*.

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Standard of Review: *de novo*.

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Standard of Review: erroneous exercise of discretion. *See Hefty v. Strickhouser*, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820.

5. Did the trial court err in dismissing plaintiff's "inconvenience damage" claim because plaintiff failed to assert any inconvenience cause of action, and failed to identify any alleged "inconvenience damages," until several months after the court imposed deadline for identifying all claims and damages asserted against Mercedes-Benz Financial?

Standard of review: erroneous exercise of discretion. *See Strickhouser, supra.*

6. Did the trial court err in dismissing plaintiff's claim for equitable relief, asking the Court to order Mercedes-Benz Financial to remove adverse credit information, if any, from plaintiff's credit report, because plaintiff failed to produce any evidence that his credit report contained negative financial information attributable to Mercedes-Benz Financial?

Standard of Review: *de novo*.

7. Did the trial court err in dismissing plaintiff's claim for equitable relief, asking the Court to order Mercedes-Benz Financial to remove adverse credit information, if any, from plaintiff's credit report, because plaintiff failed to assert such a claim until several months after the court imposed deadline for identifying all claims asserted against Mercedes-Benz Financial?

Standard of Review: erroneous exercise of discretion. *See Strickhouser, supra.*

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted. This case involves the application of well-settled legal principles and provisions of the Lemon Law to undisputed facts. Plaintiff-Appellant-Cross-Respondent's arguments are contrary to well-established legal authority, including a case decided by the Wisconsin Supreme Court in July 2009.

STATEMENT OF THE CASE

Plaintiff-Appellant-Cross-Respondent Steven T. Kilian ("Kilian") claims that Defendant-Respondent-Cross-

Appellant Mercedes-Benz USA, LLC ("MB") violated Wisconsin's Lemon Law because MB did not refund the current value of Kilian's lease to Defendant-Respondent-Cross-Appellant Mercedes-Benz Financial ("MBF"), the owner-lessor of Kilian's leased vehicle, at the same time MB satisfied its Lemon Law obligation to Kilian by timely refunding to him all lease payments Kilian had paid MBF. (Kilian Br. pp. 8-15). According to Kilian, MB's failure to make this simultaneous refund caused Kilian pecuniary loss because for a short time after Kilian's refund, MBF continued to seek lease payments from Kilian. (*Id.*, at pp. 16-18, 28-34). Kilian insists that the Lemon Law requires such a simultaneous refund by the manufacturer to the owner-lessor even though the latter does not offer to transfer the vehicle's title to the manufacturer as the Lemon Law requires. (*Id.*, at pp. 11-15). Indeed, Kilian claims that when a consumer-lessee demands a refund and returns the leased vehicle to the manufacturer, the Lemon Law *requires* the owner-lessor to relinquish ownership of the vehicle even if the owner-lessor wants to retain title in lieu of a refund. (*Id.*, at pp. 20-23).

Alternatively, Kilian contends that MBF violated the Lemon Law when it continued to pressure Kilian for lease payments for a number of weeks after he returned the leased vehicle to MB and received his refund. (*Id.*, at pp. 7-8, 28-34). Kilian argues that MBF's continued attempt to collect these payments violated WIS. STAT. § 218.0171(2)(cm)3., which provides that "no person may enforce the lease against the consumer after the consumer receives a refund." (*Id.*, at pp. 24-28). Kilian contends that MBF's violation of this Lemon Law provision caused him pecuniary loss in the form of attorneys' fees incurred in prosecuting his Lemon Law claim against MBF, general defamation damages resulting from a "possible" blotch on his credit history, and general "inconvenience" damages caused by his having to respond to MBF's collection demands until he filed suit against MBF on July 10, 2007. (*Id.*, at pp. 28-34).

Finally, Kilian claims that even if he sustained no pecuniary loss resulting from MBF's alleged violation of WIS. STAT. § 218.0171(2)(cm)3., he was nevertheless entitled to proceed with his Lemon Law action to obtain a mandatory injunction requiring MBF to clear any negative credit

information relating to his lease that might exist on his credit record. (*Id.*, at pp. 24-28).

In a decision dated October 7, 2008, and an order dated December 15, 2008, the trial court dismissed Kilian's Lemon Law claim against MB, holding that the Lemon Law unambiguously requires the owner-lessor to offer to transfer title to the manufacturer in order to obtain a refund, and that because MBF did not make such an offer to MB prior to Kilian's filing suit against MB on July 10, 2007, MB did not violate any Lemon Law provision. (A-App. 164-174).

With respect to Kilian's various Lemon Law claims against MBF, the trial court held, in a decision dated January 16, 2009, and an Order dated January 28, 2009, that Kilian was not entitled to maintain those claims, each of which resulted from MBF's short-lived attempt to collect lease payments after Kilian's returning the vehicle to MB, because: (1) attorneys' fees expended by Kilian in pursuing his claims against MBF do not constitute "pecuniary loss" under the Lemon Law; (2) Kilian did not assert any general defamation damages claim against MBF until long after the court-imposed deadline for identifying all damage claims; (3)

additionally, with respect to the alleged defamation, Kilian did not produce any evidence that defamation had ever occurred -- Kilian did not produce evidence establishing that there had been any communication by MBF to a third party relating to any alleged default by Kilian in making timely lease payments; (4) Kilian did not assert any general "inconvenience" damages claim against MBF until long after the court-imposed deadline for identifying all damage claims; (5) Kilian was not entitled to seek a mandatory injunction requiring MBF to rectify any negative credit information on Kilian's credit record because Kilian had not pleaded a claim for injunctive relief prior to the court imposed deadline for identifying all claims against MBF, and, equally important, Kilian failed to produce evidence that his credit report contained any negative information relating to his payment history under the MBF lease. (A-App. 119-200, 203-219).

The trial court also held that under the Lemon Law fee-shifting provision, WIS. STAT. § 218.0171(7), Kilian was not entitled to the $2,500 he allegedly spent in attorneys' fees in connection with filing his July 10, 2007 suit because Kilian had not sought injunctive relief seeking to interdict MBF's

collection efforts in his Lemon Law complaint, and Kilian had not shown that suit was necessary to curtail MBF's collection efforts in any event. (A-App. 207-208). Accordingly, the trial court dismissed all of Kilian's Lemon Law claims against MBF, and declined to award Kilian the $2,500 in attorneys' fees he sought in connection with filing his action on July 10, 2007. (A-App. 206-208).

INTRODUCTION

Kilian's claim that Wisconsin's Lemon Law, specifically WIS. STAT. § 218.0171(2)(b)3.a., provides that a consumer-lessee's demand for a refund of lease payments compels the manufacturer not only to make that refund but also to refund the current value of the lease to the owner-lessor, despite the latter's failure to offer to transfer title to the manufacturer, conflicts with the unambiguous language in WIS. STAT. § 218.0171(2)(cm)2., would render that provision superfluous, and would lead to absurd and patently unconstitutional consequences -- compelling the owner of a vehicle to involuntarily relinquish title to property without due process. Kilian's proffered interpretation of WIS. STAT.

§ 218.0171(2) is not only fanciful, it is frivolous within the meaning of WIS. STAT. § 802.05(2).[1]

Indeed, if there were any doubt about the vitality of Kilian's claim against MB, it is conclusively resolved by the Wisconsin Supreme Court's recent decision in *Tammi v. Porsche Cars North America, Inc.*, 2009 WI 83, ¶¶44, 46, _____ Wis. 2d _____, _____ N.W.2d _____, wherein the Court held that owner-lessors must offer to transfer title to the manufacturer in order to qualify for a refund. *Tammi* expressly rejects Kilian's claim that the manufacturer must pay a refund to the owner-lessor despite the lack of any offer by that owner-lessor to transfer title to the manufacturer.

With respect to Kilian's claims against MBF, the latter acknowledges that it erroneously continued to seek lease

[1] Whether Kilian's Lemon Law action against MB was initiated and continued in a frivolous manner, warranting sanctions, is addressed in MB's brief in support of its cross-appeal.

payments from Kilian for a short period of time after Kilian returned the vehicle to MB.[2] However, the trial court correctly dismissed Kilian's Lemon Law action against MBF because Kilian sustained no pecuniary loss resulting from MBF's short-lived collection efforts. Indeed, Kilian never even alleged having sustained any common law damages from these MBF collection efforts until long after court-imposed deadlines for asserting damage claims had expired, and Kilian was facing the prospect of summary judgment being entered against him. Moreover, Kilian lacked any evidence of a defamatory communication from MBF necessary to proceed on his defamation damages claim, and lacked any evidence that his credit report contained negative financial information sufficient to support his belated

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[2] Whether a claim can be made against a lessor under WIS. STAT. § 218.0171(7), and whether a lessor's request for lease payments after the lessee has returned the vehicle for a refund violates WIS. STAT. § 218.0171(2)(cm)3., which renders the lease unenforceable after a manufacturer refund, need not be addressed because Kilian suffered no pecuniary loss resulting from MBF's brief attempt to secure what it believed were overdue lease payments.

"equitable claim" requiring MBF to rectify any negative information in his credit record.[3]

ARGUMENT

I. WISCONSIN'S LEMON LAW, WIS. STAT. § 218.0171(2)(cm)2., UNAMBIGUOUSLY PROVIDES THAT A MANUFACTURER HAS NO DUTY TO MAKE A REFUND TO AN OWNER-LESSOR ABSENT THE LATTER'S OFFER TO TRANSFER TITLE TO THE MANUFACTURER.

Wisconsin's "Lemon Law," WIS. STAT. § 218.0171(2)(b), addresses two separate refund scenarios depending upon whether the consumer has purchased a "lemon," or whether the consumer has leased a "lemon." For purchases, the consumer may obtain a refund when a new motor vehicle does not conform to an express warranty, the consumer reports the nonconformity to the manufacturer or the manufacturer's agent, and makes the vehicle available for repair before the expiration of the warranty or one year after delivery of the vehicle, whichever is sooner. If, after reasonable attempts, the nonconformity is not repaired, the consumer may demand a refund; once the consumer offers to

[3] MBF's cross-appeal addresses the issue of whether Kilian continued his action against MBF after November 2007 in a frivolous manner, warranting sanctions under WIS. STAT. § 802.05.

transfer title to the manufacturer, the latter must provide that refund to the consumer within 30 days, and a separate refund to any holder of a perfected security interest in the vehicle.[4] The refund must include the full purchase price plus any sales tax, finance charge, amount paid by the consumer at point of sale and collateral costs, less a reasonable allowance for use (determined by a statutory formula). *See* WIS. STAT. § 218.0171(2)(b)2.b. *See also Tammi, supra*, 2009 WI 83, ¶¶35-36. To obtain the refund, the consumer-purchaser must follow the procedure set forth in WIS. STAT. § 218.0171(2)(c):

> To receive . . . a refund . . ., a consumer [purchaser] . . . shall offer to the manufacturer of the motor vehicle having the nonconformity to transfer title of that motor vehicle to the manufacturer. No later than 30 days after that offer, the manufacturer shall provide the consumer with the refund. When the manufacturer provides the . . . refund, the consumer shall return the motor vehicle having the nonconformity to the manufacturer and provide the manufacturer with the certificate of title and all endorsements necessary to transfer title to the manufacturer.

See also Tammi, supra, 2009 WI 83, ¶36.

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[4] The manufacturer must be able to obtain the lender payoff information to enable it to write the separate check to the holder of a perfected security interest. *See Marquez v. Mercedes-Benz USA, LLC*, 2008 WI App 70, 312 Wis. 2d 210, 751 N.W.2d 859.

A different refund procedure applies where the "lemon" is leased by a consumer. Because, in such a case, the consumer does not actually own the vehicle, i.e., does not have title, the legislature provided separate refund procedures for the consumer-lessee and the owner-lessor. With respect to the former, WIS. STAT. § 218.0171(2)(cm)1., provides:

> To receive a refund due under par. (b)3., [a] consumer-lessee shall offer to the manufacturer of the motor vehicle having the nonconformity to return that vehicle to the manufacturer. No later than 30 days after that offer, the manufacturer shall provide the refund to the consumer. When the manufacturer provides the refund, the consumer shall return the motor vehicle having the nonconformity to the manufacturer.

See also Tammi, supra, 2009 WI 83, ¶¶42-44.

With respect to the owner-lessor's right to a refund of the current lease value, WIS. STAT. § 218.0171(2)(cm)2., provides:

> To receive a refund due under par. (b)3., a motor vehicle lessor shall offer to the manufacturer of the motor vehicle having the nonconformity to transfer title of that motor vehicle to that manufacturer. No later than 30 days after that offer, the manufacturer shall provide the refund to the motor vehicle lessor. When the manufacturer provides the refund, the motor vehicle lessor shall provide to the manufacturer the certificate of title and all endorsements necessary to transfer title to the manufacturer.

See also Tammi, supra, 2009 WI 83, ¶¶43-44.

As noted, both WIS. STAT. § 218.0171(2)(cm)1., governing refunds to consumer-lessees, and WIS. STAT. § 218.0171(2)(cm)2., governing refunds to owner-lessors, identify WIS. STAT. § 218.0171(2)(b)3., as the statutory source for identifying the amount of the refund to which each is entitled. That statute provides:

> a. With respect to a [consumer-lessee], [the manufacturer must] accept return of the motor vehicle, refund to the motor vehicle lessor and to any holder of a perfected security interest in the motor vehicle, as their interest may appear, the current value of the written lease and refund to the consumer the amount the consumer paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use.
>
> b. Under this subdivision, the current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at the lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings.
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> c. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the consumer drove the motor vehicle before first reporting the nonconformity to the manufacturer, motor vehicle lessor or motor vehicle dealer.

See also Tammi, supra, 2009 WI 83, ¶¶39-40.

Although it is undisputed that MBF, the owner-lessor of Kilian's vehicle, did not offer to transfer title to MB, and did not seek any refund from MB, at any time prior to Kilian's filing his action on July 10, 2007, Kilian nevertheless claims that MB violated WIS. STAT. § 218.0171(2)(b)3.a. by not providing MBF with a refund of the current value of the lease within 30 days of Kilian's refund demand, which occurred on April 16, 2007 (Killian Br., pp. 4, 8-15).[5] According to Kilian, under WIS. STAT. § 218.0171(2)(b)3.a., his refund demand triggered MB's duty to provide not only Kilian's refund, but also a duty to provide MBF with a simultaneous refund, even though MBF had not offered to transfer title of the vehicle to MB, as required by WIS. STAT. § 218.0171(2)(cm)2., and even though MBF had not sought any refund from MB. (*Id.*). Indeed, Kilian claims that even if MBF wished to retain title to the vehicle it owned, Kilian's refund demand compelled MBF to relinquish title to the vehicle. (*Id.*, at pp. 20-24).

[5] MBF learned of Kilian's return of the vehicle to MB sometime between May 10, 2007 and June 15, 2007. (Kilian Br., pp. 4-5).

Kilian's proffered interpretation of WIS. STAT. § 218.0171(2)(b)3.a., not only renders WIS. STAT. § 218.0171(2)(cm)2. superfluous, it means that the Wisconsin legislature intended that consumer-lessees are entitled to force owner-lessors to relinquish title even if the latter desire to retain title. Such a strained interpretation of the Lemon Law would raise serious constitutional concerns that must be avoided if possible. The trial court correctly held that the Lemon Law unambiguously provides that the manufacturer has no statutory duty to provide a refund to an owner-lessor unless and until the latter offers to transfer title to the manufacturer. Indeed, the Wisconsin Supreme Court recently resolved this very issue in *Tammi, supra*, 2009 WI 83, ¶¶43-44:

> In a typical lease situation, a financial institution -- the lessor -- has paid the manufacturer, and the lessor holds title to the motor vehicle during the term of the lease. The lessee has financial obligations to the lessor for a specific term. . . . In short, the financial obligation of the lessee is not as great as the financial obligation of a purchaser. This is why WIS. STAT. § 218.0171(2)(b)3.a. provides that the manufacturer must refund 'to the motor vehicle lessor' -- not the consumer lessee -- 'the current value of the written lease' and why the consumer lessee receives a refund of only 'the amount the consumer paid under the written lease plus any sales tax and collateral costs [as defined], less a reasonable allowance for use.'

> *Both the consumer and the lessor have obligations to the manufacturer that must be satisfied to receive a refund.* The consumer-lessee must offer to return the motor vehicle to the manufacturer. WIS. STAT. § 218.0171(2)(cm)1. *The lessor must offer to transfer title to the manufacturer.* WIS. STAT. § 218.0171(2)(cm)2. This latter obligation may have been formalized in the contract between the lessor and the manufacturer. Once the consumer returns the vehicle and receives his refund under (2)(b)3., the lease becomes unenforceable against the consumer. WIS. STAT. § 218.0171(2)(cm)3. (emphasis added).

See also Varda v. GM Corp., 2001 WI App 89, ¶28, 242 Wis. 2d 756, 772, 626 N.W.2d 346 ("under subd. (2)(cm)2., the vehicle lessor must offer to and ultimately transfer to the manufacturer title to the vehicle.").

Wholly apart from *Tammi*, Kilian's claim that his refund demand obligated MB to provide a refund to MBF, and required the latter to relinquish title to MB, simply makes no sense. The purpose of statutory construction is to determine what the statute means so that it may be given its full, proper and intended effect. *Kolupar v. Wilde Pontiac Cadillac*, 2007 WI 98, ¶27, 303 Wis. 2d 258, 735 N.W.2d 93. As noted in *Kolupar*:

> Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. . . .

> Additionally, when multiple statutes address the same subject area, we read the statutes in *pari materia* such that both statutes will be operative. . . . If the potential for conflict between the statutes is present, we will read the statutes to avoid such a conflict if a reasonable construction exists.

Kolupar, ¶¶27-28. Indeed, as the Court of Appeals held in *Varda, supra*, 2001 WI App 89, ¶30, 242 Wis. 2d 756, 626 N.W.2d 346, each provision in the Lemon Law cannot be construed in isolation, but must be examined "in light of the entire statute."

Moreover, it is a well recognized principle of statutory interpretation that statutes should be interpreted to give meaning to each provision so that none is rendered superfluous, *see, e.g., Marotz v. Hallaman*, 2007 WI 89, ¶18, 302 Wis. 2d 428, 441, 734 N.W.2d 411, and that the court must interpret a statute to avoid unreasonable consequences if at all possible. *Id., see also, Kolupar, supra*, 2007 WI 98, ¶27; *Strenke v. Hogner*, 2005 WI 25, 279 Wis. 2d 52, 73, 64 N.W.2d 296; *State v. Schaefer*, 2008 WI 25, ¶55, 308 Wis. 2d 279, 307-08, 746 N.W.2d 457.

Kilian isolates a single provision in WIS. STAT. § 218.0171(2)(b) -- WIS. STAT. § 218.0171(2)(b)3.a. -- providing that upon direction of the consumer-lessee, the

manufacturer "must accept return of the motor vehicle, refund to the motor vehicle lessor . . . the current value of the written lease and refund to the [consumer-lessee] the amount the consumer paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use," and claims that this single passage means that even if the owner-lessor does not offer to transfer title, a manufacturer must make a refund of the current value of the lease to the owner-lessor when the consumer-lessee demands a refund of lease payments and returns the vehicle to the manufacturer. (Kilian Br., pp. 11-15). Kilian insists that if this were not so, WIS. STAT. § 218.0171(2)(b)3.a. "is rendered superfluous. There would be no purpose served by subsection (2)(b)3.a. as the duties of the consumer-lessee, lessor and manufacturer would be dictated by (2)(cm)1. and 2." (*Id.*, at p. 17).

Kilian's argument is spurious, WIS. STAT. § 218.0171(2)(b)3.a. must be viewed in the context of WIS. STAT. §§ 218.0171(2)(b)3.b. and 3.c., as well as WIS. STAT. §§ 218.0171(2)(cm)2., and (2)(cm)3. WIS. STAT. §§ 218.0171(2)(b)3.a., b., and c., describe *who* obtains a refund, i.e., the consumer-lessee and the owner-lessor, and

what is to be refunded to the consumer-lessee and the owner-lessor *when each has made a proper refund demand*, which is governed by WIS. STAT. §§ 218.0171(2)(cm)1. and 218.0171(2)(cm)2., respectively.

Kilian's proffered interpretation to the contrary, requiring the manufacturer to provide a refund to the owner-lessor at the same time the consumer-lessee obtains a refund of lease payments, and requiring the owner-lessor to relinquish title to the vehicle regardless of whether it desires to do so, nullifies WIS. STAT. § 218.0171(2)(cm)2., whi ch unambiguously requires the owner-lessor to offer title to the manufacturer as a condition to obtaining any refund. Kilian would simply read that legislative requirement out of the statute where a consumer-lessee requests a refund.

Additionally, Kilian's proffered interpretation would cause a manufacturer to be liable for another person's violation of WIS. STAT. § 218.0171(2)(cm)3., which precludes anyone from enforcing any lease against a

consumer-lessee after the latter receives a refund.[6] Kilian thus would hold a manufacturer legally responsible for any violation of that statute by a lessor regardless of whether the manufacturer has any control over the lessor, or is even aware of the lessor's violation of the statute. This makes no sense.

Kilian's proffered interpretation of WIS. STAT. § 218.0171(2)(b)3.a., also poses serious constitutional concerns. According to Kilian, a consumer-lessee, by simply demanding a refund of lease payments from the manufacturer and returning the vehicle to the manufacturer, may legally compel the owner-lessor to relinquish title to the vehicle, even if it wishes to retain that title. The owner-lessor has an ownership interest in the vehicle which cannot be nullified simply because the consumer-lessee is entitled to void the lease. Both United States and Wisconsin Constitutions forbid the taking of property without due process, and the Wisconsin legislature has not expressed any legitimate state interest requiring an owner's property to be forfeited simply because

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[6] Whether an overdue notice or a telephone call seeking collection of an overdue lease payment violates WIS. STAT. § 218.0171(2)(cm)3. is not at issue. *See* n. 2, *supra*. For purposes of this appeal, MBF will simply assume, *arguendo*, that it is.

the consumer-lessee is entitled to cancel the lease and obtain a refund of lease payments from the manufacturer.

Despite this fact, Kilian argues: "In a purchase situation, when a consumer returns a vehicle that was purchased, under subsection (2)(b)2.b., a manufacturer *must* provide a refund to both the consumer and the holder of any perfected security interest. . . . As set forth above, subsections (2)(b)2.b. [governing purchases] and (2)(b)3.a. [governing leases] mirror one another. There is absolutely no basis to interpret them differently." (Kilian Br., p. 13). Kilian could not be more mistaken. The legal difference between ownership of private property and possession of a security interest in another's property is basic and well recognized. The latter interest is contractual, and is satisfied by performance of the contract -- i.e., satisfaction or payment of the security interest. A security interest is not ownership of property -- a principle firmly established in the law and beyond rational dispute. *See, e.g.,* WIS. STAT. § 401.201(37)(a), and 68A, Am. Jur. 2d, Secured Transactions, § 31 (the purpose of a security interest in

property is to secure payment or performance of an obligation.).

Accordingly, the fact that a manufacturer must timely provide two refunds in the consumer-purchaser situation, i.e., to provide a refund to both the consumer and the holder of a perfected security interest, has absolutely no relevance to the issue here -- whether the manufacturer must provide a refund to the owner-lessor despite the lack of an offer to transfer title, and, concomitantly, whether the owner-lessor must relinquish title to private property simply because a consumer-lessee is entitled to cancel the lease and obtain a refund. As set forth in *Tammi, supra*, 2009 WI 83, ¶¶42-43 and *Varda, supra*, 2001 WI App 89, ¶28, there are significant differences between the consumer-purchaser situation and the consumer-lessee situation. Whereas in the former, where the purchaser-titleholder offers to transfer title, the manufacturer must provide a refund to both the consumer-purchaser, i.e., titleholder, and the holder of a perfected security interest, in the latter situation, it is the owner-lessor (titleholder), not the lessee who has no title, who decides whether to relinquish title in return for a refund. A manufacturer owes the refund to

the owner-lessor if, but only if, the owner-lessor (titleholder) offers to transfer title to the manufacturer.[7]

In sum, the governing provisions in WIS. STAT. § 218.0171(2)(b) can be harmonized and each given meaning, and constitutional issues avoided, only by interpreting that statutory provision as it unambiguously reads -- the manufacturer's duty to refund the current value of the lease to the owner-lessor is conditioned upon the latter's electing to transfer title to the vehicle in return for a refund. As the Court held in *Tammi, supra*, 2009 WI 83, ¶¶43-44, unless and until the owner-lessor offers to transfer title to the manufacturer, the latter has no duty to refund anything to the owner-lessor, and Kilian's contrary claim is meritless. Because it is undisputed that MBF made no offer to transfer title to Kilian's vehicle, and made no demand for a refund, before Kilian filed his action against MB on July 10, 2007, the trial court properly dismissed Kilian's Lemon Law action against MB.

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[7] As the Court observed in *Tammi*, 2009 WI 83, ¶¶36, 39-46, the similarity between WIS. STAT. §§ 218.0171(2)(b)2.b., governing refunds to consumer-owners, and § 218.0171(2)(cm)2., governing refunds to owner-lessors, is that in each case the *owner* of the vehicle must offer to transfer title as a condition to receiving a refund.

II. THE TRIAL COURT PROPERLY DISMISSED EACH OF KILIAN'S LEMON LAW CLAIMS AGAINST MBF.

A. Kilian's July 10, 2007 Complaint Against MBF.

In his complaint against MBF, filed July 10, 2007, Kilian alleged that MBF violated WIS. STAT. § 218.0171(2)(cm)3., by continuing to "enforce" the lease after Kilian returned the vehicle to MBF for a refund on May 10, 2007. According to Kilian, MBF's alleged violation consisted of telephone contacts and written notices seeking overdue lease payments. (R-App. 1-19).[8] As a result of that alleged statutory violation, Kilian claimed entitlement to a refund of the current value of the lease agreement, and twice pecuniary losses sustained both before and after the date of the complaint. *Id.* Additionally, Kilian sought "rescission of the motor vehicle lease agreement, pre-judgment interest on all liquidated sums provided by law, plaintiff's actual attorneys' fees, costs and disbursements incurred in this action, and such other relief as the court deems just and equitable." *Id.*

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[8] *See* nn. 2 and 6, *supra.*

B. Kilian's December 14, 2007 Itemization of Damages.

Pursuant to the trial court's October 15, 2007 Scheduling Order, Kilian was required to file, no later than December 14, 2007, "an itemized statement of damages claimed, including, if applicable, any special damage claims." (R-App. 23-24). The court's order specifically recited that "failure to comply with the terms of this order shall be considered cause for imposing sanctions which may include the dismissal of claims and offenses." (*Id.*).

On December 14, 2007, Kilian filed a witness list and itemization of special damages; he interposed two distinct damage claims: (a) $20,347.87, purportedly representing the amount of the refund to which Kilian was entitled under the Lemon Law which, when doubled under WIS. STAT. § 218.0171(7), equaled $40,165.74;[9] and (b) the current value of the written lease, purportedly amounting to $95,252.37, which, when doubled under WIS. STAT. § 218.0171(7), equaled $190,504.74. Kilian also claimed entitlement to

[9] The $20,347.87 represented the lease payments made by Kilian for which he had already received a refund from MB on May 10, 2007.

actual attorneys' fees and prejudgment interest which were "still accruing." (R-App. 25-30).

C. MBF's Motion For Summary Judgment And, Alternatively, To Dismiss.

Subsequently, in March, 2008, MBF moved for dismissal and summary judgment on the ground that Kilian was not entitled to any of the damages claimed in his December 14, 2007 itemization. (R. 24-33). In a hearing dated October 7, 2008, the trial court agreed, but granted Kilian additional time, until November 7, 2008, to identify any potentially recoverable damages arising out of MBF's alleged violation of WIS. STAT. § 218.0171(2)(cm)3. (A-App. 164-171).

D. Kilian's Revised Damages Claim.

On November 7, 2008, Kilian filed a new statement of damages, claiming that he was owed twice his "pecuniary loss" of $5,478.36, which was the balance shown on the computer generated account statement sent by MBF to Kilian on July 2, 2007. (R-App. 31-34). Additionally, Kilian claimed that he had incurred $2,434.25 in attorneys' fees between June 9, 2007, when counsel was retained, and July

10, 2007, when counsel filed the complaint against MB and MBF on behalf of Kilian. (*Id.*). Kilian also identified costs in the amount of $189.75 incurred in connection with the filing of his complaint. (*Id.*). Kilian claimed that all of these amounts were "pecuniary losses" which, when doubled, totaled $16,204.72. Kilian also claimed that actual attorneys' fees and costs incurred after July 10, 2007 were still accruing, as was pre-judgment interest. (*Id.*).

E. MBF Motion To Strike Kilian's Damage Claim.

On December 8, 2008, MBF moved to strike Kilian's damage claim because none of the amounts claimed constituted "pecuniary loss" under WIS. STAT. § 218.0171(7). (R. 72-74). In a response dated January 12, 2009, Kilian claimed to have sustained several categories of "pecuniary loss" allegedly resulting from MBF's violation of WIS. STAT. § 218.0171(2)(cm)3. (R-App. 50-70). In addition to the amounts identified in his November 7, 2007 revised damage claim above, Kilian now asserted the following pecuniary losses:

1. General Damages for Defamation.

In his January 12, 2009 written submission opposing MBF's motion, although Kilian had never pleaded any defamation claim, he now insisted that he was entitled to seek "general damages," as opposed to "special damages," caused by MBF's periodic reporting of negative financial information to the credit bureau and/or collection agencies -- that his financial reputation had been impaired by MBF's possible communication of defamatory financial information regarding Kilian's payment history, thus resulting in pecuniary loss. (*Id.*).

2. Inconvenience Damages.

Much like his new "defamation damage claim," which had never been pleaded, Kilian now insisted that he was entitled to seek general "inconvenience damages" in the period May 10, 2007 to July 10, 2007, as pecuniary loss resulting from answering telephone calls from MBF, and having to explain that he was not responsible for making any further lease payments after returning the vehicle to MB. (*Id.*).

3. Equitable Relief.

In addition to claiming pecuniary loss in the form of attorneys' fees and costs, general defamation damages and general inconvenience damages (these last two claims made for the first time and some two months after the court's deadline for identifying all damage claims), Kilian also claimed for the first time on January 12, 2009 that even if he had sustained no "pecuniary loss" under WIS. STAT. § 218.0171(7), he was still entitled to seek equitable relief under that provision. (*Id.*). Kilian stated that he had a right to seek injunctive relief prohibiting MBF from further publication of any defamatory matter, and requiring MBF to "wipe plaintiff's credit history clean. . .". (*Id.).*

F. Trial Court Dismissal Of Kilian's Revised Damages Claim.

In a January 16, 2009 hearing, the trial court dismissed each of Kilian's damage claims, finding that he had sustained no pecuniary loss, that several of Kilian's damage claims were first asserted long after the deadline for asserting such claims, and that Kilian had not produced any evidence establishing that any defamatory communication had been

made to third parties, i.e., credit bureaus and/or collection agencies:

> . . . [T]he court said [on October 7, 2008], well, let's frame up what's left here, and I asked the parties to give me more information, what are the damages here. And the damages, as proffered by the plaintiff, Mr. Kilian, are that there is a pecuniary damage and $5,478.36 as well as attorneys' fees, filing fee, service fee, subtotal $8,102.36 then the request is that that be doubled pursuant to 218.0171(7) of the Wisconsin Statutes.
>
> This court's review of the applicable law and the facts and circumstances of this case are such that it's clear from my review of the affidavits that Mr. Kilian never paid that amount demanded by Mercedes Financial. The record is also -- I find nothing on the record to indicate with certainty that a credit agency received a negative credit report concerning Mr. Kilian and took action to disseminate that report, that negative credit report.
>
> * * *
>
> And I believe that probably, maybe there was a report to a credit agency, but I don't have anything stating that with certainty, and I have absolutely no information whatsoever that any defamatory action or result occurred, and so that claim as it pertains to defamation is not supported on the record.
>
> An understanding -- the understanding that I have as to what a pecuniary loss is for purposes of the facts of this case, Mr. Kilian did not actually pay this amount requested by Mercedes-Benz Financial. He has no loss.
> . . .
>
> * * *
>
> In this case we have a lease arrangement. We have erroneous demands for payment of the lease amounts, we have absolutely no payment of the lease. And, understandably, there may have been attorneys' fees associated with responding to that, but I don't find that it was necessary. I don't find it was mandatory. I don't find it was any -- that there is any requirement that a lawsuit be -- I can't buy that, that a lawsuit had to be brought.

> It was clear that an error was made. That's clear from the affidavits and the submissions. So I am going to find as a matter of law that there is no pecuniary loss, and I'll also find as a matter of law based on the affidavits and filings that I have received of that part, including the depositions and attachments, that there is no genuine issue of material fact in existence as to the so-called Lemon Law claim against Mercedes-Financial.

(A-App. 205-208).

G. Kilian's Appeal.

On appeal, Kilian claims that the trial court erred in dismissing his claims against MBF because: (1) pre-suit attorneys' fees and costs, in this case totaling approximately $2,500, qualify as "pecuniary loss" under § 218.071(7) where those fees and costs result from a violation of § 218.071(2)(cm)3.; (2) defamation damages suffered by a lessee where the lessor violates § 218.071(2)(cm)3., constitute "pecuniary loss" under § 218.071(7); (3) "inconvenience damages" suffered by a lessee where the lessor violates § 218.071(2)(cm)3., constitute "pecuniary loss" under § 218.071(7); and (4) even if Kilian suffered no "pecuniary loss" under § 218.071(7), he was nevertheless

entitled to a trial on his claim for equitable relief (injunction) to "clean-up" his credit record.[10] (Kilian Br., pp. 24-34).

MBF will establish that Kilian is wrong on each count; (1) as a matter of law, Kilian sustained no "pecuniary loss" under WIS. STAT. § 218.0171(7); (2) Kilian's so-called damage claim for defamation is without evidentiary basis and was asserted long after the court imposed deadline for filing such a claim; (3) Kilian's claim for "inconvenience" damages was filed long after the court imposed deadline for filing such a claim; and (4) Kilian's alleged claim for equitable relief not only was asserted long after the deadline for filing such a claim, but also lacks any evidentiary basis warranting trial.

H. As A Matter Of Law, Attorneys' Fees And Costs Do Not Constitute "Damages" Or "Pecuniary Loss" Under WIS. STAT. § 218.0171(7).

Kilian argues that attorneys' fees and costs incurred prior to the filing of his July 10, 2007 lawsuit qualify as a "pecuniary loss" under WIS. STAT. § 218.0171(7), relying

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[10] Notably, in his appeal, Kilian does not claim that in its January 16, 2009 decision (A-App. 205-206), the trial court erred in dismissing his claim for $5,478.36, which is the amount of lease payments demanded by MBF on July 2, 2007. That damage claim was contained in Kilian's November 7, 2008 damage itemization and Kilian's January 12, 2009 opposition to MBF's motion to strike Kilian's damage claim.

upon *Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1, 523 N.W.2d 197 (Ct. App. 1994). (Kilian Br., pp. 28-30). According to Kilian, *Hughes* "determined that attorneys' fees incurred prior to commencing a lawsuit were recoverable under the Wisconsin Lemon Law." (*Id.*). While *Hughes* holds that pre-suit attorneys' fees may be recovered under the fee-shifting provision in WIS. STAT. § 218.0171(7), *Hughes* does not hold that those fees (and costs) constitute "pecuniary loss." Indeed, *Hughes* holds precisely the opposite.

It is well established that "in general, parties to a lawsuit bear the cost of their attorneys' fees absent legislative authorization to shift costs, . . . this is the so-called American Rule." *Kolupar v. Wilde Pontiac Cadillac Inc.*, 2007 WI 98, ¶16, 303 Wis. 2d 258, 735 N.W.2d 93. Moreover, as the Court held in *Kolupar*, attorneys' fees and costs are deemed to be "costs" or "disbursements" under fee-shifting statutes such as WIS. STAT. § 218.0171(7): "Among the necessary disbursements and fees allowed by law [pursuant to costs awarded under § 814.04] are those authorized under fee-shifting statutes. Numerous Wisconsin statutes contain fee-shifting provisions, including those relating to consumer

protection, frivolous lawsuits and privacy rights." *Kolupar*, 2007 WI 98, ¶¶19-20 (citing Wisconsin's Lemon Law as one of the consumer protection statutes).

While the Court of Appeals in *Hughes* held that pre-suit attorneys' fees are recoverable as "costs" under fee-shifting statutes, just like post-filing attorneys' fees and costs, the court did not hold that pre-suit attorneys' fees and costs constitute "damages" or "pecuniary loss," any more than their post-filing counterparts. Indeed, such pre-suit fees and costs in *Hughes* could hardly be deemed "damages" or "pecuniary loss" for a violation of the Lemon Law because the defendant in *Hughes* had not even violated the Lemon Law when plaintiff incurred those pre-suit fees and costs. *See Hughes*, 188 Wis. 2d at 18-19.

If there were any doubt in the above regard, it is resolved by the Supreme Court's later affirmance in *Hughes v. Chrysler Motor Corp.*, 197 Wis. 2d 973, 982, 542 N.W.2d 148 (1996): "This amendment [sec. 218.0171(7)] clarified that when a consumer prevails in a court action under the Lemon Law, the court must award double damages and attorneys' fees. *See also Reusch v. Roob*, 2000 WI App 76,

¶33, 234 Wis. 2d 270, 289, 610 N.W.2d 168 (holding that the $5,000 small claims limitation applies to pecuniary loss, but not to attorneys' fees associated with pecuniary loss under a fee-shifting statute); *Tammi, supra*, 2009 WI 83, ¶37 (observing that under 218.0171(7), a consumer is entitled to recover twice the amount of pecuniary loss, together with costs, disbursements and reasonable attorneys' fees, and any equitable relief the court deems appropriate). Obviously, pecuniary loss does not include attorneys' fees under Wisconsin's "Lemon Law," regardless of whether those fees were incurred before suit or after; otherwise they would be subject to doubling under WIS. STAT. § 218.0171(7), which they are not. In short, any and all attorneys' fees incurred in a Lemon Law action, whether pre-suit or post-filing, are "costs," not "damages" or "pecuniary loss." The trial court correctly rejected Kilian's claim that the approximately $2,500 in pre-suit attorneys' fees and costs he incurred constituted "pecuniary loss" within the meaning of WIS. STAT. § 218.0171(7). Those fees and costs could be

recovered, if at all, only as "costs" under the fee-shifting provisions in WIS. STAT. § 218.0171(7).[11]

I. The Trial Court Properly Dismissed Kilian's Belated Defamation Damages Claim Because: (1) It Was Never Pleaded; (2) Kilian Attempted To Add A Claim For Defamation Damages Several Months After The Deadline For Doing So; and (3) Kilian Failed To Provide Any Evidentiary Basis For An Award Of Defamation Damages.

It is undisputed that Kilian's July 10, 2007 complaint did not include any defamation claim, or identify any alleged defamation damages, that Kilian's December 14, 2007 itemization of damages contained no such defamation claim or damages, that Kilian's November 7, 2008 supplementary itemization of damages contained no such defamation claim or damages, and that pursuant to the trial court's October 7, 2008 Order, November 7, 2008 was the absolute deadline for submitting any and all damage claims. Finally, it is undisputed that Kilian did not assert any defamation claim, nor claim any defamation damages, until January 12, 2009,

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[11] WIS. STAT. § 218.0171(7), unambiguously provides that costs, disbursements and reasonable attorney fees may be recovered only where a consumer prevails in an action to recover pecuniary loss under the Lemon Law. Accordingly, absent plaintiff's recovery of pecuniary loss, there is no fee-shifting available under the Lemon Law. Because Kilian sustained no pecuniary loss, he would not be entitled to fees in any event.

when, in a brief submitted in response to MBF's motion to strike Kilian's claim for damages, Kilian first claimed that defamation had occurred. Because Kilian failed to timely assert any defamation claim, or a claim for defamation damages, within the court imposed deadline for doing so, the trial court properly dismissed Kilian's belated defamation claim against MBF. *See Hefty v. Strickhouser*, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820.

Moreover, the court appropriately found that Kilian had produced no evidence that any defamatory information had been communicated by MBF to any third party, and this fact further negated Kilian's claim for general defamation damages. Accordingly, the trial court correctly dismissed all aspects of Kilian's "defamation damages" claim.[12]

[12] MBF respectfully submits that because a defamation claim is a claim for personal injury, and while it may be joined as a common law damage claim along with a Lemon Law claim, it is not actually a Lemon Law claim. *See Gosse v. Navistar Internat'l Transp. Corp.*, 2000 WI App 8, ¶¶13-15, 232 Wis. 2d 163, 172-73, 605 N.W.2d 896. The issue need not be reached here, however, because the trial court appropriately dismissed Kilian's defamation claim on other grounds.

J. The Trial Court Properly Dismissed Kilian's Belated Inconvenience Damage Claim.

Just as the case with Kilian's belated defamation damages claim, Kilian never made any claim for inconvenience damages until more than two months after the court imposed deadline for identifying all damages claimed against MBF. Again, Kilian first raised his alleged inconvenience damage claim on January 12, 2009, in response to MBF's motion to strike Kilian's claim for damages. Kilian had no right to proceed on this belated claim for alleged general inconvenience damages, any more than he had a right to pursue a belated defamation damages claim. *See Hefty, supra.*[13]

K. The Trial Court Properly Dismissed Kilian's Claim For Equitable Relief Because Kilian Never Pleaded Any Claim For Equitable Relief, And Produced No Evidence That Could Possibly Form The Basis For Obtaining Equitable Relief.

Kilian argues that even if he sustained no pecuniary loss from MBF's violation of WIS. STAT. § 218.0171(7), his

[13] "Inconvenience" is a personal injury claim and not a proper Lemon Law claim in any event. *See* n. 12, *supra.*

action should not have been dismissed because that statutory provision permits him to seek equitable relief:

> Even after Mercedes finally provided a refund to Mercedes Financial, Mr. Kilian was still entitled to an equitable remedy requiring Mercedes Financial to remove its false report and wipe Mr. Kilian's credit history clean. . . . Seeking an equitable remedy from the court is a sufficient basis to commence and continue an action for violation of any section of the Lemon Law pursuant to § 218.0171(7), Wis. Stats.
>
> Mr. Kilian had sufficient grounds to commence an action to seize Mercedes Financial's collection efforts against him. Mr. Kilian was entitled to continue his action to seek equitable relief requiring Mercedes Financial to rectify the situation with his credit report. The trial court erred in dismissing Mr. Kilian's claim against Mercedes Financial because he had no pecuniary loss.

(Kilian Br., pp. 26, 28).

With respect to Kilian's claim that he was entitled to proceed with his action for injunctive relief requiring MBF to rectify his credit report, not only was such a claim for injunctive relief never pleaded by Kilian,[14] instead being raised for the first time in his January 12, 2009 opposition to MBF's motion to strike Kilian's claim for damages, but the trial court held that there was no legal basis for such an

[14] Notably, although Kilian claims to have sought different injunctive relief in his July 10, 2007 complaint, i.e., to require MBF to cease further collection efforts against Kilian (Br. pp. 24-25, 28), this is untrue. Even a cursory review of Kilian's complaint discloses no such claim for injunctive relief.

equitable claim. The trial court correctly held that Kilian had produced no evidence indicating that his credit report had actually contained any negative information regarding the MBF overdue lease payments. (A-App. 199, 206-208). Accordingly, Kilian's belated claim for injunctive relief was not only untimely, it had no legal or factual basis. The trial court properly dismissed Kilian's belated attempt to assert a claim for equitable relief.

CONCLUSION

MB and MBF respectfully submit that the trial court correctly dismissed each of Kilian's claims against them. Kilian never had a viable Lemon Law claim against MB for failure to refund the current value of the lease to MBF because the latter never offered to transfer title, nor did it demand a refund, prior to Kilian's filing suit against MB. The trial court also properly dismissed Kilian's claims against MBF because Kilian never had a viable pecuniary damage claim against MBF nor did it have any viable common law damage claim or claim for equitable relief against MBF. MB and MBF respectfully ask the Court to affirm the judgment of the trial court dismissing all of Kilian's claims against them.

Respectfully submitted this 27th day of July, 2009.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this brief is 8,008 words.

Respectfully submitted this 27th day of July, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 27th day of July, 2009.

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