STATE OF WISCONSIN COURT OF APPEALS

DISTRICT II

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent,

v.

Appeal No. 2009AP000538
(Waukesha County Circuit Court
Case No. 07-CV-1869)

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

Defendants-Respondents-Cross-Appellants.

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT, STEVEN T. KILIAN

ON APPEAL FROM CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE RALPH M. RAMIREZ PRESIDING

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ARGUMENT

I. THE WISCONSIN LEMON LAW PROHIBITS A LESSOR FROM RETAINING A "LEMON" VEHICLE WHEN A CONSUMER/LESSEE SEEKS AND RECEIVES A REFUND FROM THE MANUFACTURER UNDER THE WISCONSIN LEMON LAW.

Mercedes urges this Court to find that the lessor of a "lemon" vehicle has the option of retaining ownership of the vehicle even if the consumer/lessee seeks relief and receives a refund from the manufacturer under the Lemon Law. Mercedes' position fails to consider the public policy behind the statutory scheme--removing "lemons" from the stream of commerce and getting unsafe vehicles off the roads. Moreover, a conflict among the statutory provisions would arise from Mercedes' interpretation.

The provisions of sec. 218.0171(2)(b)3.a., Wis. Stats., and sec. 218.0171(2)(cm), Wis. Stats., can be harmonized and given full effect only by requiring a manufacturer to provide a refund to the consumer *and* the lessor in response to either a consumer or a lessor's request for relief. A lessor must provide title of the "lemon" vehicle to the manufacturer regardless of who seeks a refund under the Wisconsin Lemon Law or the statutory scheme will be frustrated.

There are two key points on which the parties disagree: whether a lessor must make a separate refund demand and whether a lessor can retain ownership of a "lemon" vehicle after a consumer receives a refund from the manufacturer under the Lemon Law.

The parties' dispute arises due to an ambiguity in the Lemon Law. Accordingly, the Court must look to the legislature's intent in enacting the law. "[A] statute should be **construed to give effect to its leading idea and the entire statute should be brought into harmony** with the statute's purpose." Hartlaub v. Coachmen Ind., Inc., 143 Wis. 2d 791, 800, 422 N.W.2d 869, 872 (Ct.App. 1988) (Emphasis added). The only way to give full effect to all Lemon Law statutory provisions and avoid creating a hazardous loophole is to require the manufacturer to provide a refund to the consumer *and* lessor in response to a request for relief from **either** a consumer or lessor--and to mandate that the lessor turn over the vehicle and title to the manufacturer.

The Lemon Law is a consumer protection statute with a strong public policy. "As to legislative object, Wisconsin's Lemon Law is obviously remedial in nature. As such, we should construe the statute with a view towards the social problem which the legislature was addressing when enacting the law. This is all the more true when, as here, the statute is ambiguous." Id., 143 Wis. 2d at 801, 422 N.W.2d at 873 (citations omitted).

Mercedes reads sec. 218.0171(2)(cm)2., Wis. Stats., in a vacuum without regard for the remainder of the statute. If Mercedes is correct, lemon vehicles bought back under the Lemon Law will remain in the stream of commerce with **unbranded titles** and consumer/lessees will be exposed to having unpaid lease obligations on their credit reports without recourse--even if the lessor does not seek to collect on the lease.

A consumer who has requested a refund, returned a lemon vehicle and fully complied with his or her Lemon Law obligations could be left in infinite limbo with an outstanding lease obligation on his or her credit report--while the lessor contemplates its move. What is the consumer to do?

What if the lessor never seeks a refund, refuses to sign over the title and retains the vehicle as Mercedes proposes? How would the consumer's credit report be cleared? Many consumers would not be able to secure financing on another vehicle as long as the unpaid lease obligation remained. *See* App. 220, App. 230. The consumer/lessee would be at the mercy of the lessor in getting the outstanding lease obligation terminated and removed from his or her credit report. Consumers could face inaction by the manufacturer and its affiliated lessor, just as Kilian did here, apparently with no recourse according to the trial court.

Pursuant to sec. 218.0171(2)(b), Wis. Stats., "the manufacturer **shall** carry out the requirements under subd. 2. or 3., whichever is appropriate." (Emphasis added). Under sec. 218.0171(2)(b)3.a., Wis. Stats., the manufacturer must "accept return of the motor vehicle." If the manufacturer properly provides a refund and takes possession from the consumer, what is the manufacturer supposed to do with the vehicle if the lessor can retain title? The manufacturer cannot fulfill its legal obligation to brand the title because it doesn't have title.

Under Mercedes' interpretation, the manufacturer and lessor could completely avoid branding the title of a lemon. Disclosure to a prospective purchaser of the lemon would be circumvented. The vehicle would be a lemon by

statutory definition, but not a lemon for all intents and purposes because no prospective buyer will even know it's a lemon. The statutory scheme mandates that the "clean" title be removed from the stream of commerce and disclosure must be made that the vehicle was bought back under the Lemon Law. Sec. 218.0171(2)(d), Wis. Stats., and sec. 342.10(3)(e), Wis. Stats.

This Court should also consider the rights of the public. There is a public need to ensure that manufacturers and lessors comply with the provisions of the Lemon Law. In addition, there is great potential for collusion between the vehicle manufacturer and lessor, especially where there is a direct relationship between the two entities as demonstrated here where Mercedes Financial is the "financial arm" of Mercedes. (R. 46: 12). (For example, the Odometer Disclosure Statement presented to Kilian when he returned his vehicle to Mercedes **did not** reflect that the vehicle was a "Manufacturer Buyback." (R. 46: 14).)

Section 218.0171(2)(cm)1., Wis. Stats., requires that the consumer/lessee shall return the vehicle to the manufacturer. Similarly, (2)(b)3.a., mandates that the manufacturer accept return of the vehicle. If Mercedes is correct that the lessor has the option of retaining the vehicle and title to it, then the requirements of (2)(cm)1., and (2)(b)3.a., cannot be fulfilled. How would the process of branding the title and disclosure to prospective purchasers under sec. 218.0171(2)(d), Wis. Stats. and sec. 342.10(3)(e), Wis. Stats., be accomplished?

The Court of Appeals has already determined that a consumer/lessee does not have the "option" of returning a lemon vehicle to the manufacturer in Varda v.

General Motors Corp., 2001 WI App 89, 242 Wis. 2d 756, 626 N.W.2d 346 (Ct.App. 2001). The Varda Court held that:

> We do not view the component of relief that the manufacturer accept return of the vehicle **as simply an option which a consumer,** as described in WIS. STAT. § 218.0171(1)(b)4, may or may not decide to take advantage of. The provisions in subd. (2)(b)2 setting forth the two alternative forms of relief available to all other categories of consumers **also contemplate that the consumer will return the vehicle.** This is logical because, in all cases, the vehicle has a nonconformity that has not been repaired after reasonable attempts at repair. Id., 242 Wis. 2d at 774-775, 626 N.W.2d at 356. (Emphasis added).

The Varda, Court recognized that the legislature provided detail on the uniformity of the return of the vehicle as a feature of every category of relief. Id. Since return of the vehicle is not an option for a consumer, how can refusing to sign over title be optional for the lessor?

A requirement that a lessor turn over title of a vehicle is not constitutionally forbidden as Mercedes argues. Significantly, since Mercedes raises this argument for the first time on appeal, it should not even be considered by this Court. *See* State v. Prineas, 2009 WI App 28, 316 Wis. 2d 414, 433, 766 N.W.2d 206, 215 (Ct.App. 2009).

Necessitating that a lessor return a vehicle that is admittedly a "lemon" to the manufacturer is not government seizure of property. Admittedly, both the United States Constitution and the Wisconsin Constitution provide that private property may not be taken for public use without just compensation. *See* Amendment V of the U.S. Constitution and Art. 1, sec. 13 of the Wisconsin

Constitution. But, returning a lemon to the manufacturer is not a "taking" for public use. Plus, the lessor would be fully compensated for the vehicle's value and any amounts due under the lease.

Further, the Constitutional guaranty of due process requires only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a substantial relation to the object sought to be attained. Chicago & North Western Ry. Co., v. La Follette, 43 Wis. 2d 631, 645, 169 N.W.2d 441, 447 (1969). In other words, a law must have a rational basis and must be tied to legitimate legislative concerns. Certainly, the requirement of removing unbranded titles from the stream of commerce meets this criteria.

A. MUST A LESSOR MAKE A SEPARATE REFUND DEMAND PURSUANT TO SEC. 218.0171(2)(cm)2., WIS. STATS.?

Mercedes' interpretation of the Lemon Law that a lessor must make a separate refund demand renders portions of the statute superfluous. Specifically, there would be no purpose served by (2)(b)3.a., if Mercedes is correct that (2)(cm)1. and 2., control the refund process. On the other hand, if (2)(cm)1. and 2., are alternatives for a consumer/lessee *or* a lessor to seek the refund described in (2)(b)3.a., each provision is given full effect.

Is a lease significantly different from a purchase under the Lemon Law? One purpose of the Lemon Law is restoring the consumer to the position he or she was in at the time of purchase or lease of a lemon vehicle. Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 977, 542 N.W.2d 148, 149 (1996). Regardless of

whether a vehicle is leased or purchased, it is as though the consumer never took delivery. This purpose cannot be fulfilled if the statute's interpretation would leave the consumer/lessee with an outstanding lease obligation because the lessor can retain ownership. At the very least, it would impede purchase of a "replacement vehicle" until his or her credit rating is cleared. The consumer would be left for some period of time with an unpaid lease obligation if the lessor can refuse to act. (R. 38: 21-23.)

B. TAMMI V. PORSCHE CARS NORTH AMERICA, INC. DOES NOT CONTROL THIS CASE.

The certified questions answered in Tammi v. Porsche Cars North America, Inc., 2009 WI 83, 768 N.W.2d 783 (2009), are unrelated to the issues presented herein. The Supreme Court's Tammi analysis was restricted to a consumer/lessee's **damages** where the consumer **exercised the option to purchase** the vehicle contained in the lease. There were four certified questions in Tammi, all related to **damages**.

The Supreme Court exercises a narrow focus when answering certified questions. On certification, the Supreme Court does not decide the issues of the case. The certification usually contains questions of law that cannot be answered by existing case law. Plastics Engineering Co., v. Liberty Mutual Ins. Co., 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613, 615 (2009). The Supreme Court addresses specific questions asked so that the court issuing the certification can

apply Wisconsin law in deciding its case. Id., 759 N.W.2d at 628 (Abrahamson, C.J. concurring).

While Tammi provides an overview of the Lemon Law, its discussion of the obligations of the manufacturer, consumer and lessor merely parrots (2)(b)3.a., and (2)(cm)1. and 2. Tammi at ¶¶ 43-44. The Tammi Court was not asked to answer the question of when a manufacturer has a duty to provide a refund to a lessor; any such comment that could be construed as interpreting the duties of a manufacturer or lessor is dicta.

Dicta are statements by a court that were not necessary to the theory on which the case was decided. Estate of Gengrich v. OHIC Ins. Co., 2009 WI 67, ¶ 39, 769 N.W.2d 481 (2009). Dicta has no precedential value. Gengrich at ¶ 39; State v. Sartin, 200 Wis. 2d 47, 65, 546 N.W.2d 449 (1996).

There is no reason to believe that the Supreme Court's Tammi decision even contemplated the issues herein. The Supreme Court was not presented with any facts or arguments that were even remotely similar to those presented here. Nor did the Supreme Court deliberate about whether a consumer/lessee and a lessor must make independent Lemon Law refund requests.

Although the Tammi decision states that the consumer/lessee may keep the vehicle when the option to purchase has been exercised, it is silent on the critical issues of title branding and disclosure to subsequent purchasers. This was not a failure of the Supreme Court to address significant issues, but rather a function of the limited scope of review.

II. MERCEDES FINANCIAL'S VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS., MANDATES A REMEDY.

A. KILIAN'S PRESUIT ATTORNEY FEES ARE A PECUNIARY LOSS.

The attorney fees Kilian incurred before commencing litigation are a pecuniary loss. Although attorney fees can be separate from a consumer's damages, the presuit attorney fees from June 9, 2007 to July 10, 2007 sought by Kilian are unlike the fees customarily awarded under sec. 218.0171(7), Wis. Stats. for insuit attorney fees.

In a typical Lemon Law claim where the consumer must give the manufacturer 30 days to comply, attorney fees incurred during the 30 day time period are prior to any manufacturer violation. After a violation and filing suit, the consumer's attorney fees are paid by the manufacturer as part of the consumer's itemized relief under sec. 218.0171(7), Wis. Stats. Here, there was no 30-day notice period. Mercedes Financial had already violated the Lemon Law by enforcing the lease in violation of (2)(cm)3., forcing Kilian to re-retain counsel. The fees incurred by Kilian between June 9, 2007 and July 10, 2007 were a direct result of the conduct of Mercedes Financial and its violation of the Lemon Law. Kilian would be entitled to compensation for such fees regardless of whether a lawsuit had been filed because the fees are a loss that he incurred. In contrast, the fees typically awarded under sec. 218.0171(7), Wis. Stats., may only be recovered as part of the litigation.

If Kilian is not guaranteed those fees, this would totally frustrate the Lemon Law, which seeks to protect the lessee who has returned a lemon--putting him in the same place he was before the lease.

B. THE TRIAL COURT DID NOT RULE THAT ANY OF KILIAN'S CLAIMED DAMAGES WERE UNTIMELY.

Mercedes Financial fails to cite any portion of the record that even alludes to a finding by the trial court that Kilian's damage claims were asserted after the deadline. While Mercedes Financial argued that Kilian's damage claims were untimely, the trial court disagreed:

> And I do find persuasive, however, the fact that this Court did grant more time to make a more particular statement about the losses, and I think that this Court certainly has the inherent authority to do so, and at the same time that decision was based in part on the prior decision that I made and a reconsideration of the issues that were before the Court. (R. 94: 29-30; App. 203-204.)

The trial court acknowledged the need for clarification of the issues/damages and properly exercised its discretion to allow Kilian additional time. Mercedes Financial erroneously argues that Kilian's claims for defamation and inconvenience damages were filed after the "absolute deadline" for submitting damage claims. In addition, Mercedes Financial incorrectly states that Kilian sought equitable relief for the first time on January 12, 2009. Kilian sought equitable relief, including recision of the lease agreement and other equitable relief, in the Complaint filed on July 10, 2007. (R. 1.) The trial court disregarded Kilian's claim for equitable relief. However, Kilian is entitled to equitable relief under subsection (7), for Mercedes Financial's violation of (2)(cm)3.

Further, Kilian was not required to prove special damages for defamation. There is a conclusive presumption of the existence of such damages which supports a jury award of monetary damages without any affirmative proof. Martin v. Outboard Marine Corp., 5 Wis. 2d 452, 459, 113 N.W.2d 135, 139 (1962); Russel M. Ware, et al., *The Law of Damages in Wisconsin*, Sec. 11.30, p. 21, 3d ed. (2000).

CONCLUSION

The Wisconsin Lemon Law requires a manufacturer to provide a refund to the lessor and mandates that a lessor sign over title to the "lemon" vehicle to the manufacturer when a consumer/lessee seeks a refund. To hold otherwise would contravene the public policy behind the Lemon Law and undo the purpose of the statutory scheme.

In addition, Kilian had a right to bring a claim against Mercedes Financial due to its continued attempted enforcement of the lease against Kilian despite his return of the vehicle. The ongoing collection efforts, as well as erroneous credit reporting, caused Kilian to incur attorney fees and suffer compensable losses. Yet, based upon the trial court's decision Kilian was denied any relief and was assessed costs.

Kilian respectfully requests that the judgment of the trial court be reversed and this matter be remanded for trial.

Dated this ___ day of September, 2009.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,797 words.

Signed:_____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

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.

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Were Mercedes-Benz USA, LLC and DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial entitled to an award of sanctions against Kilian and/or his counsel pursuant to sec. 802.05(2), Wis. Stats.?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT

Oral argument on the issues presented would be beneficial to allow the parties to develop the issues and arguments more fully than if limited to the briefs of the parties.

STATEMENT ON PUBLICATION

Publication of the decision in accordance with sec. 809.23, Wis. Stats., is warranted as this case involves an issue which will develop and clarify existing law.

STATEMENT OF THE CASE

On July 10, 2007, the Appellant-Cross-Respondent, Steven T. Kilian, filed this action against Mercedes-Benz USA, LLC (hereinafter "Mercedes") alleging a violation of sec. 218.0171(2)(b), Wis. Stats., and against DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial (hereinafter "Mercedes Financial") alleging a violation of sec. 218.0171(2)(cm)3., Wis. Stats.

On November 21, 2007, Mercedes and Mercedes Financial served Kilian with Defendants' Motion for Sanctions seeking withdrawal of the Complaint by

Kilian. (R. 72: 100-102.) Mercedes and Mercedes Financial alleged that the Complaint was frivolous and in violation of sec. 802.05, Wis. Stats. In response to such motion, Kilian requested that Mercedes and Mercedes Financial provide specific factual and legal support for its allegations. (R. 103.) However, none was provided.

Subsequently, the parties filed cross-motions for summary judgment. (R. 24-29, R. 38-41.) In addition, Mercedes and Mercedes Financial filed motions to dismiss. (R. 30-33.) The trial court issued a written decision on the parties' various motions without conducting a hearing. (R. 57.) The trial court rejected Mercedes and Mercedes Financial's arguments that Kilian had not stated a valid claim and denied their respective motions. (R. 57: 4, 6.)

In its decision, the trial court found that Mercedes did not comply with its statutory obligation to refund to the lessor the current value of the written lease and that Kilian incurred a pecuniary loss as he remained under contract to pay Mercedes Financial the monthly lease amount despite no longer having the vehicle. (R. 57: 4.) As to Kilian's claim against Mercedes Financial, the trial court found that material questions of fact existed as to whether Mercedes Financial enforced the lease against Kilian following the refund and what damages Kilian incurred. (R. 57: 6.)

After a judicial transfer due to judicial rotation on August 4, 2008, the parties proceeded with further motions as there were no disputed facts. On

September 15, 2008, Mercedes and Mercedes Financial filed a Motion for Reconsideration. (R. 63.) On October 7, 2008, at a hearing on the Motion for Reconsideration, the trial court denied the motion as to Mercedes Financial, again rejecting Mercedes Financial's argument that Kilian failed to state a valid claim. (R. 93: 57-58.) At the conclusion of the hearing, the trial court allowed Kilian until November 7, 2008 to file a statement of damages. (R. 93: 60-61, 62.)

On December 8, 2008, Mercedes Financial filed a motion to strike Kilian's claim for damages. (R. 73.) In addition, Mercedes and Mercedes Financial filed a Motion for Costs and Attorney's Fees, which incorporated its Motion for Sanctions dated November 21, 2007. (R. 73.) At a hearing on such motions, the trial court denied the Motion for Attorney's Fees and Costs on January 16, 2009. (R. 94.)

STATEMENT OF THE FACTS

The Brief of Appellant, Steven T. Kilian, already on file with the Court includes a detailed summary of the facts relevant to the issues presented. (See p. 3-6 of Appellant's Brief). Accordingly, we will not restate the facts here.

STANDARD OF REVIEW

Erroneous exercise of discretion is the standard of review for a discretionary act such as whether to award sanctions. Indus. Roofing Services, Inc. v. Marquardt, 2007 WI 19, 299 Wis. 2d 81, 96, 726 N.W.2d 898, 906 (2007). The decision to impose sanctions and which sanctions to impose are within a

circuit court's discretion. Id. "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Id. (Citation omitted).

ARGUMENT

Summary of Argument

An inquiry of whether the trial court correctly determined that Mercedes and Mercedes Financial were not entitled to sanctions against Kilian and/or his counsel must begin with the underlying claims. Kilian commenced this action after his efforts, and those of his counsel, to have Mercedes pay off the lease obligation to Mercedes Financial and to stop Mercedes Financial's attempts to collect outstanding lease payments proved unsuccessful.

At the time the lawsuit was filed, Mercedes Financial had repeatedly demanded payment under the lease from Kilian and claimed that he was responsible for payment of the lease despite his return of the vehicle. (R. 39: 2, 8, 9; App. 102, 108, 109; R. 38: 26.) Kilian had an outstanding motor vehicle lease obligation of over $95,000 but no longer had the vehicle. By the time he filed this action, Kilian had incurred unnecessary attorney fees and costs in attempting to stop Mercedes Financial's collection attempts and rectify the situation. In addition, Kilian had suffered damages as a direct result of the actions of Mercedes and Mercedes Financial.

Kilian unequivocally had a basis to commence this action against Mercedes and Mercedes Financial. In fact, Mercedes and Mercedes Financial agree Kilian's claims were valid from the time of filing through August 2007 when the motor vehicle lease was paid off. (See p. 8 of Cross-Appeal Brief of Defendants-Respondents-Cross-Appellants). However, Kilian's damages did not vanish simply because Mercedes finally paid off the lease and Mercedes Financial stopped harassing Kilian for payment. Mercedes and Mercedes Financial offer no reasonable explanation as to why Kilian would conceivably dismiss his claims without any compensation for his losses or the attorney fees and costs he had incurred up to that point in the litigation. Kilian was clearly entitled to continue the litigation and pursue recovery for his losses.

I. THE TRIAL COURT PROPERLY EXCERCISED ITS DISCRETION IN DENYING MERCEDES AND MERCEDES FINANCIAL'S REQUEST FOR SANCTIONS.

This case involves issues of first impression based upon unique factual circumstances. It took over a year and a half to address numerous complicated motions filed by the parties, which involved difficult legal issues. The complexity of this matter is demonstrated by the fact that Mercedes and Mercedes Financial waited over one year to bring their motion for sanctions before the trial court. If Mercedes and Mercedes Financial were confident that Kilian's claims were meritless, why did they delay in bringing their motion? Obviously, this action is

not as cut and dried as Mercedes and Mercedes Financial would lead this Court to believe.

In ruling on Mercedes and Mercedes Financial's motion for sanctions, the trial court considered the extensive history of the case and the events that led up to the filing of the motion. While Mercedes and Mercedes Financial cite to only one paragraph of the trial court's decision, claiming that the court failed to make the requisite factual determinations, the trial court's decision was actually quite lengthy. (R. 94: 29-34; App. 203-208.) The trial court's decision incorporated many findings, which support its decision to deny Mercedes and Mercedes Financial's request for sanctions.

In its decision denying Mercedes and Mercedes Financial's motion for sanctions the trial court explicitly stated that Kilian's claim was not frivolous:

> There is a request for attorney's fees, and I am going to deny the request for attorney's fees, and I am not prepared at this time to make a finding that this was a frivolous lawsuit or action, I should say. I think it took us a while to get at least to November 7th, when a specific claim was clarified, and I find no support as a matter of law, but I think it took us a while to get there, and I'm not going to find that it's frivolous in that respect. (R. 94: 34-35; App. 208-209.)

Based upon its finding that Kilian's claim was not frivolous, the trial court properly denied Mercedes and Mercedes Financial's request for attorney fees and costs.

A. DECISION TO DENY SANCTIONS IS DISCRETIONARY.

As recognized by Mercedes and Mercedes Financial, whether to award sanctions pursuant to sec. 802.05, Wis. Stats., lies within the discretion of the trial court. The court must first find that a party violated sec. 802.05(2), Wis. Stats., and then determine whether an award of sanctions pursuant to sec. 802.05(3), Wis. Stats., is appropriate under the circumstances.

Section 802.05, Wis. Stats., differs significantly from the former sec. 802.05, Wis. Stats., and sec. 814.025, Wis. Stats. "The differences include the description of the conduct subjecting a party to sanctions and the type of sanctions that may be imposed." Trinity Petroleum, Inc. v. Scott Oil Co., Inc., 2007 WI 88, 302 Wis. 2d 299, 314, 735 N.W.2d 1, 8 (2007). Further, under the new rule regarding sanctions, even if a court makes a finding of frivolousness, sanctions are no longer mandatory. Id., 302 Wis. 2d at 313, 735 N.W.2d at 8.

In order to impose sanctions pursuant to sec. 802.05, Wis. Stats., the court must first find that the claims, defenses and legal contentions are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; that the lawsuit was presented for an improper purpose; or that the factual contentions have no evidentiary support. Sec. 802.05(2), Wis. Stats. If a court determines that sec. 802.05(2), Wis. Stats., has been violated, the court *may* impose an appropriate sanction. Sec. 802.05(3), Wis. Stats.

In this case, the trial court did not find that Kilian's claims were frivolous nor did the court determine that there was a violation of sec. 802.05(2), Wis. Stats. Absent a violation of sec. 802.05(2), Wis. Stats., the trial court could not award sanctions against Kilian or his counsel pursuant to sec. 802.05(3), Wis. Stats. Accordingly, the denial of attorney fees and costs to Mercedes and Mercedes Financial was appropriate.

B. KILIAN'S GOOD FAITH ARGUMENT FOR EXTENSION OR MODIFICATION OF THE LAW CANNOT BE FRIVOLOUS.

The standard for determining whether an action is frivolous requires the court to assess if the claim is made in good faith to advance a change in the law. Courts must be cautious in declaring an action frivolous. Juneau County v. Courthouse Employees, 221 Wis. 2d 630, 650, 585 N.W.2d 587, 595 (1998). "Frivolous action claims are an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." Radlein v. Industrial Fire & Cas. Ins. Co., 117 Wis. 2d 605, 613, 345 N.W.2d 874, 879 (1984).

The threat of sanctions should not deter litigants and their counsel from pursuing a change in the law. "Lawyers must have the opportunity to be able to espouse a legal principle not presently accepted without fears of personal loss or prosecution for unethical conduct…" Id., 117 Wis. 2d at 614, 345 N.W.2d at 879. An argument made in good faith that the law is ready for consideration, extension

or modification is not frivolous. "The argument for change need not be successful as long as made in good faith and also is one that could be made by a reasonable attorney." Id.

The Wisconsin Supreme Court has acknowledged that any doubt of whether a claim is frivolous is to be resolved in favor of the party asserting a modification or extension of the law. "The court has stated that doubts about frivolousness should be resolved in favor of the litigant or attorney, 'because it is only when *no* reasonable basis exists for a claim or defense that frivolousness exists.'" Juneau County, 221Wis. 2d at 650, 585 N.W.2d at 595. (Citation omitted) (Emphasis supplied).

It cannot be said that there was no reasonable basis for Kilian's claims. The claims advanced by Kilian may not be the typical claims asserted under the Wisconsin Lemon Law but it does not follow that his claims are frivolous. Kilian's claims bring an undeveloped area of the Lemon Law to the forefront and provide this Court an opportunity to clarify important issues. Kilian's pursuit to be restored to the position he was in prior to taking delivery of a "lemon" vehicle and be made whole under the Wisconsin Lemon Law is not a sanctionable violation of sec. 802.05, Wis. Stats.

II. KILIAN STATED A VALID CLAIM AGAINST MERCEDES.

Mercedes summarily concludes that Kilian's claim against it was frivolous and in violation of sec. 802.05(2)(b), Wis. Stats., without providing any support

for its allegations. The sole authority relied upon by Mercedes is Tammi v. Porsche Cars North America, Inc., 2009 WI 83, 768 N.W.2d 783 (2009), which does not sustain its accusations of frivolousness.

Mercedes incorrectly argues that Kilian's claim has been "categorically rejected" by the recent decision in Tammi. As set forth in detail in Kilian's reply brief, Tammi does not address any of the issues presented in this case, including the crucial issue of when a manufacturer has a duty to provide a refund to a vehicle lessor. Tammi does not even discuss, let alone reject, Kilian's claim against Mercedes. More importantly, the Wisconsin Supreme Court's opinion in Tammi was released during the pendency of this appeal and cannot form the basis for finding that Kilian's commencement of an action over two years prior to Tammi was frivolous.

Kilian had a right to assert a claim against Mercedes because it was refusing to pay off the outstanding lease obligation at the time he commenced this action. Despite several letters and attempts to resolve the situation by Kilian and his counsel, Mercedes failed to take the appropriate action. (R. 38: 30-41, 43-45; R. 39: 2.) It was not until August 29, 2007, nearly two months into the lawsuit, that Mercedes finally issued a refund to Mercedes Financial. (R. 38: 21-23.)

Mercedes argues that Kilian's claim is frivolous because it disagrees with his interpretation of the provisions of the Wisconsin Lemon Law. The parties differing interpretations of the law demonstrate that the statute is ambiguous. In

fact, the two judges at the trial court level also had different interpretations of the statutory provisions at issue.

The trial court initially determined that Kilian stated a valid claim against Mercedes:

> MB-USA complied with §218.0171(2)(b)(3)(a) only as to its refund to the consumer but did not comply with its statutory obligation to refund to the lessor the current value of the written lease. Kilian incurred a pecuniary loss as he remained under a contract to pay MB-Financial the monthly lease amount despite no longer having the vehicle. The motion of MB-USA to dismiss the first cause of action of the complaint is denied as the facts stated in the complaint reflect a violation of §218.0171(2)(b)(d)(a) [sic] Wis. Stats. (R. 57: 4.)

The reasonableness of Kilian's reading of the statutory provisions is apparent from the trial court adopting his position and denying Mercedes' motions. Simply because another judge subsequently interpreted the statute differently on reconsideration does not make Kilian's claim frivolous.

Although there are some appellate decisions that offer guidance, Kilian's claim against Mercedes presents a unique issue that has not been expressly decided. Kilian's claim addresses the need to clarify the duties of manufacturers and lessors under the Wisconsin Lemon Law. Kilian's claim against Mercedes advances the extension and modification of existing law as well as the establishment of new areas of the Lemon Law. Therefore, his claim against Mercedes may hardly be construed as frivolous.

III. KILIAN'S CLAIM AND REQUEST FOR DAMAGES AGAINST MERCEDES FINANCIAL WAS WELL SUPPORTED BY LAW AND THE EVIDENCE OF THE CASE.

Mercedes Financial misstates Kilian's claims and request for damages. Kilian did not "delete" the damages he initially sought. Rather, after Mercedes was dismissed from this action, Kilian modified the damages requested and distinguished the damages he sought from Mercedes Financial. At no point did Kilian seek damages of $20,847.87 or $95,252.37 from Mercedes Financial. Such sums were part of Kilian's claims for damages against Mercedes for violation of sec. 218.0171(2)(b), Wis. Stats.

Mercedes Financial also repeatedly charges Kilian with asserting claims and damages after the deadline and in violation of the scheduling order. (See p. 4, 8 and 11 of Cross-Appeal Brief of Defendants-Respondents-Cross-Appellants). It raised the same argument at the trial court to no avail. The trial court flatly rejected Mercedes Financial's argument:

> And I do find persuasive, however, the fact that this Court did grant more time to make a more particular statement about the losses, and I think that this Court certainly has the inherent authority to do so, and at the same time that decision was based in part on the prior decision that I made and a reconsideration of the issues that were before the Court. (R. 94: 29-30; App. 203-204.)

Moreover, defense counsel acknowledged that the trial court acted within its discretion and extended the time for Kilian to make his claim for damages. (R. 94: 36; App. 210.)

Mercedes Financial had the opportunity to appeal the trial court's decision but elected not to do so. It must stop belaboring the point and making false accusations against Kilian. (See p. 4, 8 and 11 of Cross-Appeal Brief of Defendants-Respondents-Cross-Appellants).

Further, Mercedes Financial chose not to appeal whether Kilian asserted a valid claim against it. Both trial court judges found that Kilian could bring a cause of action against Mercedes Financial for violation of sec. 218.0171(2)(cm)3., Wis. Stats. (R. 57: 6; R. 93: 57-58.) Kilian's claim against Mercedes Financial was not dismissed because the trial court found that he did not have a viable claim but because the trial court held that Kilian did not suffer a pecuniary loss, which is one of the issues appealed by Kilian. (R. 94: 33-34.) The primary issue regarding Kilian's claim against Mercedes Financial involved the damages he is entitled to receive due to its violation of sec. 218.0171(2)(cm)3., Wis. Stats. The damages for a violation of (2)(cm)3. are not clearly defined as is the case with other claims under the Wisconsin Lemon Law.

The sole issue brought before this Court by Mercedes and Mercedes Financial is the denial of their request for sanctions under sec. 802.05, Wis. Stats. Since the trial court found that Kilian's claim against Mercedes Financial was not frivolous and found no violation of sec. 802.05(2), Wis. Stats., the trial court's denial of sanctions to Mercedes Financial was appropriate.

At the time Kilian commenced this action, Mercedes Financial was actively pursuing payment under the motor vehicle lease, despite being informed that Kilian had returned the vehicle to Mercedes under the Wisconsin Lemon Law. (R. 38: 26-27, 30-41, 43-45; R. 39: 2, 8, 9.) Mercedes Financial acknowledges that Kilian was justified in bringing this lawsuit and continuing it through August 2007 when the lease was finally paid off. (See p. 7 of Cross-Appeal Brief of Defendants-Respondents-Cross-Appellants). However, Kilian was not required to dismiss his claims in August 2007 simply because Mercedes fulfilled its obligation to pay off the lease and Mercedes Financial stopped harassing him for payment. Their conduct had already caused Kilian to incur losses. Moreover, Kilian was entitled to payment of his attorney fees and costs incurred up to that point in the litigation. Kilian is entitled to compensation and should not be forced to walk away suffering a loss as Mercedes Financial suggests. Nor should Kilian be subject to sanctions for pursuing his rights under the Wisconsin Lemon Law in an effort to be made whole.

IV. THIS COURT IS NOT IN A POSITION TO FIND THAT KILIAN AND/OR HIS COUNSEL VIOLATED SEC. 802.05(2), WIS. STATS., AND IMPOSE SANCTIONS.

Despite Mercedes and Mercedes Financial's arguments, this Court is not in a position to make a finding that Kilian or his counsel violated sec. 802.05, Wis. Stats., and impose sanctions. In support of their argument, Mercedes and Mercedes Financial completely misstate and misinterpret the Wisconsin Supreme

Court's ruling in Sommer v. Carr, 99 Wis. 2d 789, 299 N.W.2d 856 (1981). The Sommer Court did not hold that remand was unnecessary where the trial court findings were inadequate. (See p. 6 of Cross-Appeal Brief of Defendants-Respondents-Cross-Appellants). To the contrary, the Wisconsin Supreme Court reversed the Court of Appeals decision, wherein the Court of Appeals attempted to make its own findings. Id., 99 Wis. 2d at 793, 800, 299 N.W.2d at 857, 861. In Sommer, the Wisconsin Supreme Court also noted that: "When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings." Id., 99 Wis. 2d at 792, n. 1, 299 N.W.2d at 857 (Citation omitted).

The Wisconsin Supreme Court also outlined the proper course of action upon a determination that the trial court's findings are inadequate in Minguey v. Brookens, 100 Wis. 2d 681, 303 N.W.2d 581 (1981). "As a general matter, when faced with inadequate findings, an appellate court may: (1) look to an available memorandum decision for findings and conclusions; (2) review the record anew and affirm if a preponderance of the evidence clearly supports the judgment; (3) reverse if the judgment is not so supported; or (4) remand for further findings and conclusions." Id., 100 Wis. 2d at 688, 303 N.W.2d at 583.

It is apparent that an appellate court should not substitute its judgment for that of the trial court and attempt to make its own findings. An appellate court

"cannot and should not exercise the discretion which is properly the circuit court's." King v. King, 224 Wis. 2d 235, 254, 590 N.W.2d 480, 487 (1999), *quoting* LaRocque v. LaRocque, 139 Wis. 2d 23, 43, 406 N.W.2d 736 (1987).

As set forth above, the trial court's findings in this case were not inadequate. The trial court clearly found that Kilian's claims were not frivolous and did not find that Kilian or his counsel violated sec. 802.05(2), Wis. Stats. Even if this Court were to determine that the trial court's findings were inadequate, the appropriate course of action is to remand for the trial court to make the requisite findings.

Moreover, Mercedes and Mercedes Financial have not alleged that Kilian's appeal is frivolous. In order to bring such issue before this Court, Mercedes and Mercedes Financial were required to bring a motion alleging that Kilian's appeal was frivolous. Since the time for them to do so has expired, Mercedes and Mercedes Financial cannot look to this Court for sanctions. *See* sec. 809.25(3)(a), Wis. Stats.

CONCLUSION

Kilian suffered losses pursuant to the Wisconsin Lemon Law. He has a right to be made whole and in good faith asserted claims against Mercedes and Mercedes Financial. Kilian was forced to file a lawsuit in order to get Mercedes to comply with its obligation to pay off his outstanding lease and to stop Mercedes Financial's unfounded attempts to collect payment from him.

The trial court correctly found that Kilian's claims were not frivolous and properly denied Mercedes and Mercedes Financial's request for sanctions. There is absolutely no basis for this Court to disturb the trial court's determination.

Kilian respectfully requests that the Court affirm the trial court's denial of sanctions pursuant to sec. 802.05, Wis. Stats., to Mercedes and Mercedes Financial.

Dated this ___ day of September, 2009.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,794 words.

Signed:_____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

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.

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