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WISCONSIN COURT OF APPEALS
DISTRICT II

09-29-2009

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

**CROSS-APPEAL REPLY BRIEF OF DEFENDANTS-
RESPONDENTS-CROSS-APPELLANTS
MERCEDES-BENZ USA, LLC, AND MERCEDES-
BENZ FINANCIAL**

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I. PLAINTIFF KILIAN HAD NO REASONABLE BASIS TO CONTINUE HIS ACTION AGAINST MERCEDES-BENZ OR MERCEDES-BENZ FINANCIAL AFTER NOVEMBER 21, 2007.

Plaintiff-Appellant-Cross-Respondent Steven T. Kilian (“Kilian”) repeatedly insists that he had a reasonable basis to commence his July 2007 action against Defendants-Respondents-Cross-Appellants Mercedes-Benz USA, LLC and Mercedes-Benz Financial (“MB/MBF”). (Kilian Br., pp. 4-5, 10, 14). Even assuming, *arguendo*, that Kilian is correct in this regard, whether or not Kilian’s commencement of the action against MB and MBF in July 2007 was justified is not the issue. The issue is whether Kilian’s continuation of his action was justified after MB/MBF’s November 21, 2007 demand that the action be dismissed.

Kilian was not justified in continuing his action against MB or MBF after November 21, 2007 because, after that date, Kilian had no reasonable factual or legal basis for claiming that he had sustained any pecuniary loss from MB’s and/or MBF’s alleged Lemon Law violations. Because pecuniary loss is a necessary component of all Lemon Law damage claims, Kilian had no legally viable Lemon Law

claim against either MB or MBF after November 21, 2007.¹

Indeed, the *only* timely pecuniary loss claim Kilian advances in his appeal is the claim that the \$2,500 Kilian incurred in pre-suit attorneys' fees constitutes a pecuniary loss for purposes of the Lemon Law. (Kilian Reply Br., pp. 9-10).

But Kilian acknowledges in his response to the MB/MBF Cross-Appeal that the attorneys' fees at issue were not included in his pecuniary loss claim:

By the time he filed this action [July 2007], 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.

. . . 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 attorneys' fees and costs* he had incurred up to that point in the litigation. . . .

(Kilian Resp. Br., pp. 4-5). (emphasis added)

In any event, as MB/MBF established in prior briefing, the \$2,500 in attorneys' fees Kilian incurred prior to filing his action cannot be regarded as pecuniary loss under any

¹ Although Kilian attempted to file related claims for defamation, inconvenience and equitable relief in January 2009, these claims were asserted after the cutoff date for doing so and the trial court properly dismissed them. (See MB/MBF Cross-Appeal Br., p. 11; MB/MBF Response Br., pp. 37-41).

reasonable interpretation of the Lemon Law. (*See* MB/MBF Resp. Br., pp. 33-37, and MB/MBF Br. on Cross-Appeal, p. 10).²

The simple fact is that Kilian had no legitimate claim of having sustained any pecuniary loss after November 21, 2007 (after his lease was paid off), and Kilian fails to establish otherwise in his brief responding to MB/MBF's Cross-Appeal. Without a legally viable claim of having sustained pecuniary loss as a result of an alleged violation of the Lemon Law, Kilian had no viable Lemon Law claim to pursue. Kilian's continuing his Lemon Law action against MB and MBF in spite of this fact warrants an appropriate sanction.

II. EVEN IF THE UNDISPUTED FACTS IN THE RECORD DO NOT WARRANT THIS COURT'S DETERMINING AN APPROPRIATE SANCTION, THE ISSUE SHOULD BE REMANDED TO THE TRIAL COURT.

Kilian argues that if this Court determines that the trial court's findings regarding the propriety of imposing

² If Kilian had not frivolously continued his Lemon Law action after November 21, 2007, he might have been entitled to the \$2,500 under the fee-shifting provisions of the Lemon Law, Wis. Stat. § 218.0171(7). However, that \$2,500 in attorneys' fees can in no way be regarded as pecuniary loss under that section.

sanctions are inadequate, the correct course is to remand the issue for further findings and conclusions by the trial court. (Kilian Resp. Br., pp. 14-16). While this course of action is mandatory where the appellate court is confronted with material facts in dispute, *see Sommer v. Carr*, 99 Wis. 2d 789, 792 n. 1, 299 N.W.2d 856 (1981), MB/MBF respectfully submit that for the reasons discussed, the material facts are not in dispute so that, at the very least, this Court may determine whether Kilian's continuation of his Lemon Law action after November 21, 2007 was justified. Because, as Kilian correctly observes, sanctions are not mandatory, this Court, exercising its discretion, may then either determine an appropriate sanction or remand the matter to the trial court to make this determination.

Regardless of the remedy chosen by this Court, and despite Kilian's insistence to the contrary (Kilian Resp. Br., pp. 5-6, 8, 17), there can be no real dispute but that the trial court did not properly exercise its discretion in denying MB/MBF's request for sanctions. There is *no* evidence in the record supporting Kilian's claim that the trial court satisfied its obligation to make the requisite specific findings of fact, or

that it provided the reasoned explanation necessary to support
a reasonable exercise of discretion:

A discretionary decision, to be sustained, must be based upon the facts of record and reliance on the appropriate standard of law. . . . Most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.

Vries v. Brookman, 2005 WI App 158, ¶13, 285 Wis. 2d 411, 421, 701 N.W.2d 642; *see also*, *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981), and *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

Here, the trial court provided *no* explanation in its decision denying sanctions other than pointing to the fact that it was not until November 7, 2008 that the trial court actually found that no viable pecuniary loss claim had been asserted by Kilian. (A-App. 208-209). But the issue of whether Kilian improperly continued his Lemon Law claim against MB/MBF beyond November 21, 2007 is not governed by the fact that his claim was not dismissed until November 7, 2008. It is governed by the fact that in the period November 21, 2007 to November 7, 2008, and thereafter, Kilian never had a


viable pecuniary loss claim against either MB or MBF. As a result, appropriate sanctions are warranted.

CONCLUSION

MB and MBF respectfully ask this Court to determine whether, based upon the undisputed facts of record, Kilian improperly continued his Lemon Law action against MB and MBF beyond November 21, 2007. If so, MB and MBF also ask the Court to impose appropriate sanctions upon Kilian for improperly continuing his unjustified Lemon Law claim or, alternatively, to remand the issue to the trial court so that it may properly exercise its discretion in making the sanctions determination.

Respectfully submitted this 28th day of September, 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 1,141 words.

Respectfully submitted this 28th day of September, 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 28th day of September,
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