SUPREME COURT OF WISCONSIN

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent-Petitioner,

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.

BRIEF OF PETITIONER, STEVEN T. KILIAN

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TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED……..1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION……...1

STATEMENT OF THE CASE…….2

I. Facts of the Case…….2

II. Procedural History……..5

ARGUMENT……6

Summary of Argument…….……6

I. ATTORNEY FEES PURSUANT TO SEC. 218.0171(7), WIS. STATS., ARE AWARDABLE TO A CONSUMER THAT SUES FOR RECISSION OF A MOTOR VEHICLE LEASE TO STOP THE LESSOR'S ENFORCEMENT EVEN WHERE THE CONSUMER DID NOT SUFFER A SEPARATE PECUNIARY LOSS……..9

A. A Consumer Is Not Required To Suffer A Pecuniary Loss In Order To Maintain An Action Under The Wisconsin Lemon Law……..9

B. A Consumer Who Sues Under The Wisconsin Lemon Law Without Suffering A Separate Pecuniary Loss Is Entitled To An Award Of Attorney Fees……17

II. ATTORNEY FEES INCURRED BY A CONSUMER TO BLOCK THE ENFORCEMENT OF A MOTOR VEHICLE LEASE IN VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS., QUALIFY AS DAMAGES UNDER SEC. 218.0171(7), WIS. STATS…….21

III. THE "AMERICAN RULE" REGARDING ATTORNEY FEES DOES NOT APPLYTO LEMON LAW VIOLATIONS…….25

IV. A CONSUMER CAN RECOVER DAMAGES PURSUANT TO SEC. 218.0171(7), WIS. STATS., FOR DEFAMATION THAT IS A DIRECT RESULT OF ENFORCEMENT OF A MOTOR VEHICLE LEASE IN VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS……26

CONCLUSION……...31

CERTIFICATION……..34

APPENDIX CERTIFICATION…….35

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)……36

TABLE OF AUTHORITIES

STATE CASES

Church v. Chrysler Corp., 221 Wis. 2d 460, 585 N.W.2d 685 (Ct.App. 1998)……..9, 22

City of Sheboygan, 2008 WI 64, 310 Wis. 2d 337, 750 N.W.2d 475……..11, 12

Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997)……11

Cuellar v. Ford Motor Co., 2006 WI App 210, 296 Wis. 2d 545, 723 N.W.2d 747 (Ct.App. 2006)……..11, 12, 13, 17

Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982)……..30

Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis. 2d 670, 610 N.W.2d 832 (2000)……9

Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 523 N.W.2d 197 (Ct.App. 1994)……...18, 22, 24

Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 542 N.W.2d 148 (1996)……9, 18, 19, 22, 24

Kilian v. Mercedes-Benz USA, LLC and DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial, 2010 WI App 62, 324 Wis. 2d 583, 785 N.W.2d 687 (Ct.App. 2010)……..2, 10, 20, 22, 25, 27, 28

Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58 (2004)…….....25

Kolupar v. Wilde Pontiac Cadillac, Inc., 2007 WI 98, 303 Wis. 2d 258, 735 N.W.2d 93 (2007)……...26

Lake Beulah Management District v. State Department of Natural Resources, 2010 WI App 85, 787 N.W.2d 926 (Ct.App. 2010)……12

Lawrence v. Jewell Companies, Inc., 53 Wis. 2d 656, 193 N.W.2d 695 (1972)…30

Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962)……..28

Nick v. Toyota Motor Sales, U.S.A., Inc., 160 Wis. 2d 373, 466 N.W.2d 215 (Ct.App. 1991)……22

Tammi v. Porsche Cars North America, Inc., 2009 WI 83, 320 Wis. 2d 45, 768 N.W.2d 783 (2009)……23

Teff v. Unity Health Plans Ins. Corp., 2003 WI App 115, 265 Wis. 2d 703, 666 N.W.2d 38 (Ct.App. 2003)……29

Starobin v. Northridge Lakes Dev. Co., 94 Wis. 2d 1, 287 N.W.2d 747 (1980)…29

STATE STATUTES

Sec. 218.015, Wis. Stats……18

Sec. 218.015(7), Wis. Stats……18

Sec. 218.0171, Wis. Stats……11, 18

Sec. 218.0171(2)(b), Wis. Stats……23

Sec. 218.0171(2)(cm)3., Wis. Stats……1, 3, 8, 13, 17, 18, 21, 22, 24, 26, 27, 32

Sec. 218.0171(2)(d), Wis. Stats……..22

Sec. 218.0171(7), Wis. Stats……1, 9, 10, 11, 12, 18, 21, 22, 23, 26, 31, 32

Sec. 218.0172, Wis. Stats……...11

Sec. 218.0172(4), Wis. Stats……11, 12

Sec. 814.01(1), Wis. Stats……...11

FEDERAL CASES

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)……28, 29

OTHER AUTHORITIES

Article 1, sec. 9 of the Wisconsin Constitution……7

Barron's Law Dictionary (3rd Ed. 1991)……...23

Federal Trade Commission Bureau of Consumer Protection Division of Consumer and Business Education, Building a Better Credit Report, March, 2008……...16

The Law of Damages in Wisconsin, Sec. 11.30, p. 21, 3d. ed. (2000)……28

Your Credit Score Helps Determine What You'll Pay For Credit And Insurance, http://ftc.gov/bcp/menus/consumer/credit/reports.shtm…….16

STATEMENT OF ISSUES PRESENTED

I. When a consumer sues for rescission of a motor vehicle lease (in order to stop the lessor's collection efforts), is a consumer entitled to an award of attorney fees pursuant to the Wisconsin Lemon Law, sec. 218.0171(7), Wis. Stats., even though the consumer may not have suffered a separate pecuniary loss?

Answered by the circuit court: No.

Answered by the Court of Appeals: No.

II. Does a consumer suffer damages under sec. 218.0171(7), Wis. Stats., where attorney fees are incurred to block the enforcement of a motor vehicle lease in violation of sec. 218.0171(2)(cm)3., Wis. Stats.?

Answered by the circuit court: No.

Answered by the Court of Appeals: No.

III. Can a consumer recover damages pursuant to sec. 218.0171(7), Wis. Stats., for defamation that is a direct result of enforcement of a motor vehicle lease in violation of sec. 218.0171(2)(cm)3., Wis. Stats.?

Answered by the circuit court: No.

Answered by the Court of Appeals: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication of the decision are warranted in this case. Oral argument would assist this Court in review of this case given that the questions presented are unique questions of law with statewide impact for

Wisconsin consumers. Oral argument is also necessary to fully address the conflict of the Court of Appeals' decision with existing authority.

STATEMENT OF THE CASE

Steven T. Kilian petitioned the Supreme Court of Wisconsin for review of the Wisconsin Court of Appeals' decision affirming the judgment and order of the Waukesha County Circuit Court, the Honorable Ralph M. Ramirez presiding, in Kilian v. Mercedes-Benz USA, LLC and DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial, Appeal No. 2009 AP 538, Waukesha County Case No. 07-CV-1869. Judge Ramirez granted Mercedes-Benz USA, LLC's (hereinafter "Mercedes") motion to dismiss Kilian's claims against it and subsequently granted summary judgment in favor of DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial (hereinafter "Financial"). (App. 111-220; R. 77; R. 88-89; R. 93; R. 94). The Court of Appeals' decision affirming the trial court was filed on March 24, 2010. (App. 110-110). Kilian's Petition for Review was filed on April 23, 2010 and granted review by an Order dated September 14, 2010.

Kilian respectfully requests that this Court reverse the trial court's dismissal of his claims against Mercedes and award of summary judgment to Financial as well as the decision of the Court of Appeals affirming the trial court.

I. Facts of the Case

On March 21, 2006, Kilian entered into a thirty-nine month lease agreement with Financial for a 2007 Mercedes-Benz S550V LWB. (R. 39: 4-6).

Kilian experienced numerous problems with the vehicle which led him to seek a refund under the Wisconsin Lemon Law. (R. 38: 4-8). In response, Mercedes agreed to provide Kilian a refund. On May 7, 2010, Kilian returned the vehicle to Mercedes in exchange for a check in the sum of $20,847.87. (R. 39: 1-2, 7).

After Kilian returned the vehicle to Mercedes, Kilian began receiving telephone calls, including daily calls for a period of time, from representatives of Financial demanding payment under the motor vehicle lease – in direct violation of sec. 218.0171(2)(cm)3., Wis. Stats., which provides that the lease was UNENFORCEABLE once Mercedes accepted return of the vehicle. (R. 39: 2). Kilian clearly explained to Financial on several occasions that he had returned the vehicle to Mercedes under the Lemon Law. (R. 39: 2; R. 40: 26). On one occasion, the representative of Financial responded to Kilian that the return of the vehicle under the Lemon Law was between him and the dealership and that he STILL had a financial obligation to Financial. (R. 39: 2).

Kilian made numerous attempts to resolve this matter short of litigation. Kilian contacted Joe Tolfa of Concours Motors, Inc., the dealership where he leased the vehicle, seeking assistance in having the vehicle lease terminated. (R. 39: 2). When these attempts failed, in mid-June of 2007, Kilian was forced to retain counsel at his own expense. On June 15, 2007, Kilian's attorney sent letters directed to Financial, Mercedes and their counsel, notifying them that Kilian was receiving daily telephone calls from Financial. (R. 38: 30-41). On June 20, 2007, Financial sent a letter advising that it would refrain from further contact with

Kilian and apologized for the phone calls Kilian received. (R. 38: 42). On June 26, 2007, Kilian's counsel sent a second letter to Financial, with a copy to its counsel, requesting that Financial terminate the lease and provide confirmation of same to Kilian. (R. 38: 43-45). Despite Kilian's efforts, the lease was not terminated by Financial nor was the lease paid off by Mercedes.

Thereafter, Kilian received a "Federal Legal Notice" (dated July 1, 2007) from Financial which explicitly threatened to report **negative information** about his lease account **to credit bureaus**. (R. 39: 8). As threatened, Financial did thereafter report information to the credit bureaus regarding Kilian's "unpaid" lease account - even though Killian was protected by the Wisconsin Lemon Law. (R. 38: 29). Kilian also received a payment notice from Financial dated July 2, 2007, seeking payment of $5,478.36. (R. 39: 9). Financial admitted to sending the notices to Kilian. (R. 38: 16-17). Financial also admitted that it contacted Kilian seeking payment under the lease after his return of the vehicle. (R. 38: 21).

When it became apparent that Kilian's extra-judicial efforts (without resorting to litigation) to resolve the situation were failing to cause Financial to cease its collection "efforts", Kilian filed suit on July 10, 2007. (R. 1). Ultimately on October 1, 2007, and only after suit was filed by Kilian 's lawyers, Financial admitted that Kilian was not obligated to make any further lease payments. (R. 38: 19). It also admitted that Financial was not entitled to receive any lease payments after Kilian returned the vehicle to Mercedes. (R. 38: 18, 19, 27). On

August 29, 2007, Mercedes sent a check in the sum of $95,252.37 to Financial for the payoff of Kilian's lease. (R. 38: 21-23).

II. Procedural History

On July 10, 2007, Kilian commenced this action under the Wisconsin Lemon Law against Mercedes and Financial. (R. 1). Kilian's claim against Mercedes pertained to its failure to pay off his motor vehicle lease within 30 days of his request for a refund in accordance with the Wisconsin Lemon Law. Kilian also sought relief against Financial for its illegal enforcement of his motor vehicle lease, Financial's subsequent threat to report and its eventual reporting of Kilian to the credit reporting agencies for his alleged failure to make timely payments on his lease - all in an attempt to force Kilian to make lease payments after he returned the subject vehicle to Mercedes.

In March of 2008, Mercedes and Financial independently filed motions to dismiss and for summary judgment and Kilian filed a motion for summary judgment. (R. 24-33; R. 38-41). On May 23, 2008, the trial court issued a written decision denying the parties respective motions without a hearing. (R. 57).

A pretrial conference was conducted on August 6, 2008, after a judicial transfer. The parties agreed that there were no material disputed facts and agreed to conduct further motion proceedings. In September of 2008, Kilian filed a supplemental motion for summary judgment and Mercedes and Financial filed a joint motion for reconsideration. (R. 60-63). At a hearing on October 7, 2008, the trial court denied Kilian and Financial's motions but granted Mercedes' motion for

reconsideration and dismissed all claims against Mercedes. (App. 111-173; R. 93). An order was entered on December 15, 2008. (App. 174-175; R. 77).

On December 8, 2008, Financial filed a motion to strike claim for damages along with a motion for costs and attorney fees on behalf of Financial and Mercedes. (R. 72-74). At a hearing on January 16, 2009, the trial court granted the motion to strike and denied the motion for costs and attorney fees. (App. 176-217; R. 94). The trial court signed an order granting summary judgment in favor of Financial on January 28, 2009. (App. 218-219; R. 88). Judgment was entered on February 6, 2009. (App. 220; R. 89).

Kilian filed a notice of appeal on March 3, 2009, regarding the orders and judgments of the trial court in favor of Mercedes and Financial. (R. 91). Mercedes and Financial filed a notice of cross-appeal on March 31, 2009, for the trial court's denial of their request for costs and attorneys' fees under sec. 802.05(3), Wis. Stats. (R. 92).

ARGUMENT

Summary of Argument

To coin an old phrase, here's the rub: Financial, even after being warned by Kilian's attorneys, violated the Lemon Law rule that prohibits a lessor from enforcing a lease after a leased vehicle is returned to the manufacturer. Kilian sustained harassment, negative reporting of his credit to the credit bureaus, as well as economic and non-economic damages as a result of Financial's illegal efforts.

Yet, both lower courts herein provided no remedy to Kilian to enforce his statutory Lemon Law rights.[1]

1. The Lemon Law explicitly states that after a leased vehicle is returned to the manufacturer, no person may thereafter enforce the lease. Financial attempted to enforce the lease. Kilian tried to get Financial to stop on his own. When that failed, he was forced to hire lawyers at his own expense. Thus, only because Financial acted in direct contravention of the Lemon Law did Kilian suffer economic losses.

2. Financial was advised and warned by Kilian's lawyers of the Lemon Law provision prohibiting its enforcement efforts. Rather than deter it, Financial threatened to report Kilian to the credit reporting agencies so as to force him to pay (or be economically defamed). After said warnings, without regard for the Lemon Law, Financial sent Kilian a "Federal Legal Notice" threatening to report negative information to credit bureaus and a payment notice seeking $5,478.36 from Kilian. (R. 39: 8-9). This case presents the question: should Financial escape Kilian's damages in the face of a blatant violation of the Lemon Law?

[1] The lower court decisions' interpretation of the Wisconsin Lemon Law leaves consumers without a remedy despite a clear violation of the statute. Such an interpretation is inconsistent with the Wisconsin Constitution which provides that: "[e]very person is entitled to a certain remedy in the law for all injuries…" Article 1, sec. 9 of the Wisconsin Constitution.

3. Kilian suffered economic damages - at the very least his attorney fees before and after suit - ONLY because Financial insisted on enforcing an unenforceable lease.

4. The result of the lower court decisions is to shut the courtroom doors on consumers and allow violators to escape liability for their actions. Here, Financial's one arm promised no further collection, while its other arm continued full boar. The Court of Appeals' decision protects lessors and leaves consumers with a hole in their wallets as they attempt to protect themselves.

The Wisconsin Lemon Law was not intended to leave consumers vulnerable to economic harm after they have returned their vehicle to the manufacturer. In fact, the Lemon Law was intended to ensure that consumers so harmed would have a remedy. The prohibition against continued enforcement of a motor vehicle lease in sec. 218.0171(2)(cm)3., Wis. Stats., is rendered meaningless if Kilian, and other consumers going forward, must suffer economic losses by hiring lawyers and commencing legal actions to stop illegal collection attempts. Litigation costs will leave consumers defamed and harmed without recourse.

The damages here are not just economic: Kilian was subjected to harassing phone calls, demands for payment, threats to his credit and false reports to the credit bureaus - all by Financial. Financial would not cease its efforts to collect

payment on the lease short of litigation - even though Kilian's attorneys explicitly warned that Financial's efforts were illegal. (R. 38: 30-31).

I. ATTORNEY FEES PURSUANT TO SEC. 218.0171(7), WIS. STATS., ARE AWARDABLE TO A CONSUMER THAT SUES FOR RECISSION OF A MOTOR VEHICLE LEASE TO STOP THE LESSOR'S ENFORCEMENT EVEN WHERE THE CONSUMER DID NOT SUFFER A SEPARATE PECUNIARY LOSS.

The lower court decisions mandate that a consumer must suffer a pecuniary loss in order to maintain a Wisconsin Lemon Law claim. The Court of Appeals' decision barred Kilian from collecting the damages he incurred even though he was forced to file suit to enforce his rights and stop Financial's illegal collection efforts. Such a result is contrary to the purpose of the Wisconsin Lemon Law.

The primary purpose of the Lemon Law is to put the consumer back to the position the consumer was in at the time he or she took delivery of the "lemon" vehicle. Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 977, 542 N.W.2d 148, 149 (1996); Church v. Chrysler Corp., 221 Wis. 2d 460, 468, 585 N.W.2d 685, 688 (Ct.App. 1998); Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis. 2d 670, 684, 610 N.W.2d 832, 838 (2000). To hold that Kilian cannot be compensated for his attorney fees undoes the purpose of the Wisconsin Lemon Law. Kilian has not been restored to his original position as he has had to bear the expense of Financial's violations.

A. A Consumer Is Not Required To Suffer A Pecuniary Loss In Order To Maintain An Action Under The Wisconsin Lemon Law.

The Court of Appeals' inquiry regarding Kilian's claim against Financial focused on the issue of pecuniary loss. The Court of Appeals asked: "What pecuniary loss did Kilian suffer?" Kilian v. Mercedes-Benz USA, LLC and DaimlerChrysler Financial Services Americas, LLC d/b/a Mercedes-Benz Financial, 2010 WI App 62, ¶ 10, 324 Wis. 2d 583, 785 N.W.2d 687 (Ct.App. 2010). (App. 100-110). However, the result of this query was not outcome determinative and should not have controlled the Court of Appeals' decision.

The plain language of the Wisconsin Lemon Law does not require that a consumer suffer a pecuniary loss in order to maintain an action. The pertinent section of the statute provides that:

> In addition to pursuing any other remedy, a consumer may bring an action to recover **for any damages** caused by a violation of this section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate. Sec. 218.0171(7), Wis. Stats. (Emphasis added.)

The statutory language permits a consumer to bring an action for a violation of *any* provision of the Wisconsin Lemon Law regardless of whether the consumer has suffered a pecuniary loss. Pursuant to these provisions of sec. 218.0171(7), Wis. Stats., a consumer can bring an action to recover damages or equitable relief - in addition to seeking recovery of a pecuniary loss. These provisions allow for a consumer, such as Kilian, to commence an action seeking rescission of a motor vehicle lease even though the consumer may not have incurred a separate pecuniary loss.

The remedies afforded to consumers under subsection SEVEN of sec. 218.0171, Wis. Stats., **mirror** that of subsection FOUR of sec. 218.0172, Wis. Stats., regarding motor vehicle adjustment programs:

> In addition to pursuing any other remedy, a consumer may bring an action to recover damages caused by a violation of this section. A court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, notwithstanding s. 814.04(1), and any equitable relief the court determines appropriate. Sec. 218.0172(4), Wis. Stats.

[We use the term "mirror" because the two statutes are nearly identical, except for an additional reference to sec. 814.01(1) in sec. 218.0172(4), Wis. Stats.]

Despite the identical language these two statutes - sec. 218.0172(4), Wis. Stats., and sec. 218.0171(7), Wis. Stats., - the Court of Appeals herein failed to follow a prior controlling decision of the Court of Appeals and instead **issued a conflicting decision in this case**. In Cuellar v. Ford Motor Company, 2006 WI App 210, 296 Wis. 2d 545, 723 N.W.2d 747 (Ct. App. 2006), the Court of Appeals examined the provisions of sec. 218.0172(4), Wis. Stats., and the relief available to consumers and concluded that no pecuniary loss was required. Not only did the Court of Appeals fail to follow Cuellar, it did not even mention Cuellar in its decision despite Kilian's citation to the decision and the discussion of the case in the trial court. (App. 194-196; R. 94: 19-21).

Given the nearly identical statutory language, the Court of Appeals was obligated to follow the previous decision or ask this Court to settle the controversy. Cook v. Cook, 208 Wis. 2d 166, 189-190, 560 N.W.2d 246, 256 (1997); *see also* City of Sheboygan, 2008 WI 64, 310 Wis. 2d 337, 338, 750

N.W.2d 475, 476; Lake Beulah Management District v. State Department of Natural Resources, 2010 WI App 85, 787 N.W.2d 926, n. 3 (Ct.App. 2010). The differing interpretations of sec. 218.0171(7), Wis. Stats., and sec. 218.0172(4), Wis. Stats., in this case and Cuellar cannot be reconciled.

More importantly, the decision issued by the Cuellar Court is well-reasoned and should be the law. The Cuellar Court reversed the trial court's award of summary judgment to Ford on the basis that the consumers did not establish a pecuniary loss and could not make a claim: "Again, the trial court was mistaken in its belief that the statute requires a showing that pecuniary loss be incurred in order to maintain a claim." Id., 296 Wis. 2d at 562, 723 N.W.2d at 755.

In reaching its conclusion that the trial court was mistaken regarding the issue of pecuniary loss, the Cuellar Court examined the statutory language of sec. 218.0172(4), Wis. Stats. "In addition, the plain language of the statute provides that the court 'shall award … any equitable relief the court determines appropriate." Id. The Cuellar Court also noted that: "The plain language of the **statute does not require, in all instances, a pecuniary loss**. Accordingly, the trial court's determination that Cuellar did not have standing because he did not suffer any pecuniary loss was erroneous." Id., at n. 11. (Emphasis added.)

The Cuellar Court found that there were issues that needed be resolved by the finder of fact. "The proper remedy in this case is not for this court to decide. Whether the class has suffered any pecuniary loss, …or whether any other equitable relief is appropriate all present issues of fact, which need to be decided

by a fact-finder after discovery has been completed." Cuellar, 296 Wis. 2d at 562, 723 N.W.2d at 755.

Just as the consumers in Cuellar, Kilian did not commence this action as a result of pecuniary loss. Kilian's claim arose out of Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats., which states that: "No person may enforce the lease against the consumer after the consumer receives a refund due under par. (b) 3." Sec. 218.0171(2)(cm)3., Wis. Stats. Kilian sought rescission of his motor vehicle lease agreement and relief from Financial's illegal collection efforts.

Kilian suffered other losses: he endured daily telephone calls from Financial's representatives demanding payment, threats of negative reports to credit bureaus, payment notices seeking thousands of dollars from him, and ultimately A FALSE reporting of non-payment (of the lease) to credit bureaus regarding his "unpaid" lease account. (R. 39: 2, 8, 9; R. 38: 29).

Prior to filing suit, Kilian exhausted his options trying to block Financial's collection efforts. Kilian explained to Financial's representatives that he had returned the vehicle to Mercedes under the Lemon Law, contacted his dealer for assistance, and eventually re-retained counsel (over a month after he had returned the "lemon" vehicle) to send letters to Financial, Mercedes and their counsel. (R. 38: 30-41; R. 39: 2; R. 40: 26). Despite an apology from Financial and assurance that Financial would refrain from further contact with Kilian, **the collection attempts did not stop**. (R. 38: 16-17, 21, 42).

Financial claimed that the notices to Kilian and credit reporting agencies were part of an automated system:

> Q: Was any action taken to stop the automated notices from going out to Mr. Kilian?
>
> A: Well, you know, if we don't receive a payoff from Mercedes-Benz USA then there's still a balance showing on the account. So, you know, there's no way to stop automatically-generated letters such as this. If there is a balance due the system automatically generates a letter.
>
> Q: So, there's no way for you to go to the Collections Department and stop an automated notice from being sent to a customer?
>
> A: Not that I'm aware of, no. You know, these are automatically generated and the Collections cannot really stop them either.

(R. 24: 17).

If what the Financial representative said is anywhere near true, then **how is a repeat of the Kilian experience not a certainty for another consumer lessee going out into the near future**? Why will other motor vehicle finance companies take any steps to change their "automated" system - they will merely follow the Court of Appeals decision herein - "no (pecuniary) harm, no foul."

Financial admitted that it did not stop its collection efforts against Kilian - although clearly illegal. Financial was not concerned with why Kilian had stopped making his lease payments - it was only interested in pursuing payment from him. It was not until Kilian filed suit that the notices and harassing phone calls came to an end - miraculously, **the filing of a lawsuit changed the allegedly "automatic" collection efforts from a "go" to a "stop."** Kilian was forced by Financial to

bring the instant action in order to maintain his reputation and to stop the collection efforts, regardless of whether he suffered a pecuniary loss. Financial's aggressive collection would not have stopped, without litigation.

The Court of Appeals' decision provides no incentive for lessors in the same position as Financial to change how they operate. Lessors have no reason to cease collection efforts if they WILL NOT be penalized for violating the Lemon Law and if they do not face the consequences of paying the consumer's attorney fees and costs necessarily incurred as a result of their violation.

By ending its inquiry after concluding that Kilian did not have any pecuniary loss, the Court of Appeals neglected to examine other relevant considerations, including the impact of its decision on Wisconsin consumers. As illustrated by this case, consumers are left vulnerable to a multitude of problems that can arise where the lessor, Financial, chooses to retain the "lemon" vehicle and does not make a demand for relief from the manufacturer, Mercedes. (Although we refer to the lessor as "Financial", its complete name is "Mercedes-Benz Financial".) As demonstrated by the actions of Financial herein, return of the vehicle to the manufacturer BY THE CONSUMER does not bring the matter to an end for the consumer. Where the motor vehicle lease is not paid off by the manufacturer, a consumer lessee will be subject to harassing phone calls, demands for payment of the lease and false reporting to credit reporting agencies defaming his or her credit rating - all because the process will still be on "automatic."

How can a consumer stop attempts to collect payment on a lease for which the consumer has no further liability? According to the Court of Appeals' decision, a consumer must pay his own costs for any action unless he or she can establish an independent pecuniary loss as a result of the lessor's conduct. Further, since there is no requirement that the lease be paid off, the outstanding lease obligation will remain on a consumer's credit report indefinitely.

How does the consumer buy or lease a new car - with a present outstanding lease obligation showing on his credit report? Information such as outstanding debts, bill-paying history, the number and type of accounts, and late payments impact **a consumer's credit score** – and, therefore, his or her ability to obtain credit. The outstanding unpaid lease obligation will negatively impact consumer credit ratings and many consumers will be precluded from securing financing for a replacement vehicle until the lease is paid off. Id. *See Your Credit Score Helps Determine What You'll Pay For Credit And Insurance*, at http://ftc.gov/bcp/menus/consumer/credit/reports.shtm; (App. 221-224), and Federal Trade Commission Bureau of Consumer Protection Division of Consumer and Business Education, Building a Better Credit Report, March, 2008, at 5; (App. 225-248).

Worse yet, false reports that a consumer is in default on the lease will drastically impact the consumer's credit. Anyone with the unfortunate experience of a bad credit rating from the legal blackmail of credit companies knows that **their credit scores drop precipitously** and their ability to obtain credit dries up.

And, just try to get the false report removed - the consumer will need more than a good team of lawyers!

Consumers must have a means to enforce the duty owed by lessors under sec. 218.0171(2)(cm)3., Wis. Stats., and be able to seek relief where a lessor violates such provisions. Independent pecuniary loss is irrelevant to the troubles facing consumers where a lessor violates the provisions of sec. 218.0171(2)(cm)3., Wis. Stats.

Kilian should not be precluded from seeking relief under the Wisconsin Lemon Law for Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats., on the grounds that he did not suffer a separate pecuniary loss. Similar to Cuellar, the proper remedy for Kilian must be determined by a jury, not summarily disposed of on a finding that he did not suffer a separate pecuniary loss. Kilian should have been given the opportunity to present his claims to a jury for a determination of whether he suffered any pecuniary loss, whether he should be awarded damages or whether any equitable relief was appropriate due to Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats.

B. A Consumer Who Sues Under The Wisconsin Lemon Law Without Suffering A Separate Pecuniary Loss Is Entitled To An Award Of Attorney Fees.

The prohibition of enforcement of a lease against a consumer after return of a "lemon" vehicle set forth in sec. 218.0171(2)(cm)3., Wis. Stats., is rendered meaningless by the Court of Appeals' holding that consumers cannot be awarded attorney fees in a legal action to stop a lessor's illegal collection efforts. The

statutory language mandates that a consumer that prevails in an action *shall* be awarded reasonable attorney fees and costs. Sec. 218.0171(7), Wis. Stats. The fee-shifting provision of the Wisconsin Lemon Law applies to the entire statute. If a consumer is forced to commence an action to stop the lessor's violation, as was the case here, the end result is that the lessor's violation costs the consumer money. For most consumers, litigation will be cost prohibitive. Such a scenario defeats the purpose of the Wisconsin Lemon Law and leads to an absurd result.

As noted by the Court of Appeals in Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 523 N.W.2d 197 (Ct.App. 1994), *aff'd* 197 Wis. 2d 973, 542 N.W.2d 148 (1996), consumers are entitled to an award of attorney fees where there has been a violation of the Wisconsin Lemon Law. "Section 218.015(7), STATS., allows recovery of reasonable attorney's fees only when there has been a violation of the statute." Id., 188 Wis. 2d at 19, 523 N.W.2d at 204, n. 6.[2]

Where there has been a violation, regardless of what section of the statute has been violated, a consumer is entitled to an award of attorney fees. Under the lower court decisions herein, consumers are afforded no protection by sec. 218.0171(2)(cm)3., Wis. Stats., and are left without a remedy for a violation of this section if attorney fees are not recoverable.

This Court also acknowledged the importance of the fee-shifting provision of the Wisconsin Lemon Law in Hughes by noting that one purpose of awarding

[2] Section 218.015, Wis. Stats. was renumbered to sec. 218.0171, Wis. Stats., in 1999 but the substance of the law was unchanged.

attorney fees to consumers is to persuade manufacturers to resolve claims. "The manufacturer will have to consider more carefully the costs of litigating the dispute when there is the prospect of double damages as well as attorney's fees and other costs." Id., 197 Wis. 2d at 984, 542 N.W.2d at 152. The same reasoning should apply to Financial - a decision supporting Kilian's claims will "encourage" finance companies to change their "automatic" collection efforts and to resolve lease disputes, instead of reporting consumers to credit bureaus as a form of legal blackmail. (R. 39: 8-9).

The fee-shifting provision is intended to give consumers the ability to pursue claims for a violation: "These corporations not only have the wealth and will to exhaust an individual litigant, but also control vast amounts of technical expertise…Without the sweetener of double damages in a sufficient amount and reasonable attorney's fees, few consumers would bring such actions." Id. Although there can be no double damages assessed against Financial in this case, at least allowing a consumer to recover his or her attorney fees when forced to bring a lawsuit would provide consumers with the necessary means to do so.

Based upon the Court of Appeals' decision, lessee consumers face exposure to continued enforcement of a motor vehicle lease even after return of a "lemon" vehicle. This case demonstrates the potential for harm to consumers. Kilian had to suffer through numerous demands for payment, threats to his credit, and false credit reports regarding his "unpaid" lease account. (R. 39:2, 8, 9; R. 38: 29). Kilian attempted to rectify the situation by explaining to Financial's

representatives that he returned the "lemon" to Mercedes and by seeking the assistance of his dealer. (R. 39: 2; R. 40: 26). When Kilian's efforts proved fruitless, he re-hired his Lemon Law counsel; unfortunately, even his (well-recognized) Lemon Law attorney **was unable to resolve the matter without litigation**. Financial refused to stop its "automatic" collection efforts - including reporting Kilian to the credit bureaus. Only a lawsuit brought the collections efforts to a halt.

Despite repeated notices that it was in violation of the Wisconsin Lemon Law, Financial did nothing to prevent continued automated notices from being sent to Kilian and the credit bureaus. (R. 24: 17). How could Financial, armed with Kilian's attorney's warnings, then report Kilian falsely to the credit bureaus? It seems too incredible to be true - but it is. Kilian endured all of this despite the fact that it is undisputed **he had no further payment obligation under the lease**. (R. 38: 18, 19, 27).

Once the lawsuit had been filed, it took several months for Kilian's lease to be paid off by Mercedes-Benz. (R. 38: 21-23). The Court of Appeals acknowledged that action was required by both Mercedes and Financial at the time Kilian filed suit. Kilian at ¶ 17. (App. 110). Yet, the Court of Appeals denied Kilian any recovery of attorney fees, all necessary to put an end to Financial's illegal enforcement of his lease.

By bringing this action, Kilian prevailed in stopping Financial's collection efforts and having his vehicle lease terminated. Financial's violation of sec.

218.0171(2)(cm)3., Wis. Stats., triggered the fee-shifting provision of sec. 218.0171(7), Wis. Stats. Accordingly, Kilian was entitled to an award of his attorney fees under the Wisconsin Lemon Law. The lower court holdings that Kilian must bear the expense of his attorney fees and litigation costs violates Wisconsin precedent as well as the explicit language of the Lemon Law.

II. ATTORNEY FEES INCURRED BY A CONSUMER TO BLOCK THE ENFORCEMENT OF A MOTOR VEHICLE LEASE IN VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS., QUALIFY AS DAMAGES UNDER SEC. 218.0171(7), WIS. STATS.

A consumer is entitled to recover damages resulting from a violation of the Wisconsin Lemon Law. These damages should include the PRE-SUIT attorney fees a consumer is forced to incur to block a lessor's enforcement after a "lemon" vehicle has been returned to the manufacturer as such fees are the direct result of the lessor's violation of sec. 218.0171(2)(cm)3., Wis. Stats.

Damages and pecuniary loss under the Wisconsin Lemon Law are separate and distinct concepts. The most significant distinction between damages and pecuniary loss is that sec. 218.0171(7), Wis. Stats., mandates that a consumer shall be awarded twice the amount of any pecuniary loss. In contrast, other damages may be awarded to a consumer, but such other damages are not doubled.

The Wisconsin Lemon Law provides that "…a consumer may bring an action to recover for any damages caused by a violation of this section." Sec. 218.0171(7), Wis. Stats. The law also provides that a consumer that prevails in an action shall be awarded twice the amount of any pecuniary loss. In its analysis of

Kilian's claim for attorney fees in this case, the Court of Appeals incorrectly intertwined the two concepts as "pecuniary damages." Kilian at ¶ 11. (App. 105-106). It is apparent from the wording of sec. 218.0171(7), Wis. Stats., that the law permits recovery of damages **or** pecuniary loss **or both** depending upon the factual circumstances of the case.

Pecuniary loss under the Wisconsin Lemon Law has been construed as the amount of the refund the consumer should have received from the manufacturer where the manufacturer wrongfully refused the consumer's request for a refund. Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 13, 523 N.W.2d 197, 202 (Ct. App. 1994); Church v. Chrysler Corp., 221 Wis. 2d 460, 470, 585 N.W.2d 685, 689 (Ct. App. 1998); Nick v. Toyota Motor Sales, U.S.A., Inc., 160 Wis. 2d 373, 466 N.W.2d 215 (Ct. App. 1991), *overruled in part by* Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 986, 542 N.W.2d 148, 152 (1996).

While the typical Wisconsin Lemon Law claim arises out of a manufacturer's failure to issue a timely refund or provide a comparable new vehicle, the law permits consumers to seek relief for other violations. For example, a consumer may bring an action under the Wisconsin Lemon Law for a violation of sec. 218.0171(2)(cm)3., Wis. Stats., as Kilian did, or for a violation of the disclosure requirements for the sale of a manufacturer buyback vehicle as set forth in sec. 218.0171(2)(d), Wis. Stats. **Such violations do not cause a consumer to suffer a pecuniary loss**, but they will result in other losses to the consumer. The damages available to a consumer under sec. 218.0171(7), Wis.

Stats., provide relief for the losses caused by such other violations. Awarding such damages to consumers is consistent with the principle of general damages which are defined as: "monetary compensation which the law awards to one who has been injured by the action of another." *Barron's Law Dictionary* (3rd Ed. 1991).

Damages under sec. 218.0171(7), Wis. Stats., differ from pecuniary loss in that damages are losses suffered by a consumer resulting from a statutory violation that do not qualify as pecuniary loss and are not subject to doubling of the award. An example of such damages was noted by this Court in Tammi v. Porsche Cars North America, Inc., 2009 WI 83, 320 Wis. 2d 45, 768 N.W.2d 783 (2009):

> If the lessee has voluntarily spent money to accessorize the leased vehicle and then must give the accessorized vehicle back to the manufacturer upon refund of the lease obligation, the lessee may be able to seek reimbursement of these costs. **Whether such costs would be included in the lessee's "pecuniary loss" under the statute would depend on the facts**. Id., 320 Wis. 2d at 72, 783 N.W.2d at 796, n. 20. (Emphasis added.)

As this Court recognized in Tammi, the **consumer may recover the costs** of such accessories **but the same may not qualify as a pecuniary loss**. Pursuant to the refund provisions of sec. 218.0171(2)(b), Wis. Stats., any amount paid by the consumer at the point of sale is required to be refunded; accessories added at the time of sale would be included in the refund and would be part of the consumer's pecuniary loss. However, if the accessories were added to the vehicle subsequent to purchase and delivery, the amount paid for such accessories would not be part of the refund due to the consumer and, consequently, would not constitute a pecuniary loss. Nevertheless, **the cost of the accessories added to**

the vehicle subsequent to purchase and delivery is still a cost to the consumer for which the consumer is entitled to seek reimbursement.

The same is true of the attorney fees incurred by Kilian in trying to cease Financial's collection efforts. The Court of Appeals' conclusion that Kilian was not entitled to recover his pre-suit attorney fees is contrary to existing authority:

> **It is reasonable to award attorney's fees for time spent on demand letters and similar work performed before the thirty days have expired.** These activities are usually directly related to the lemon law claim and recovery of fees spent on such activities ensure that the auto manufacturers will be diligent in responding to the consumer's claims. The attorney's fees provision is intended to give manufacturers an incentive to promptly reply to a consumer's complaint. **Recovery of fees for time spent prior to the expiration of that thirty days is consistent with that goal**. Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 18-19, 523 N.W.2d 197, 204 (Ct.App. 1994), *aff'd* 197 Wis. 2d 973, 542 N.W.2d 148 (1996). (Emphasis added.)

The rationale relied upon by the Hughes Court is equally applicable to this case. The time expended by Kilian's counsel prior to filing suit was directly related to Financial's violation and Kilian's Lemon Law claim. Kilian's counsel sent numerous letters to Financial, Mercedes and their counsel notifying them of the violation and trying to reach a resolution. (R. 38: 30-41, 43-45). Financial ignored these repeated warnings - and even went so far as to issue a bad credit notice to the credit bureaus.

But for Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats., Kilian would not have had to re-retain counsel to contact Financial and inform them of the error of their ways. Why should Kilian bear the expense of Financial's illegal attempts to obtain payment from him? Especially given Financial's admission that it contacted Kilian after he was not obligated to make any further lease payments.

(R. 38: 16-19, 21, 27). Requiring Kilian to pay his own attorney fees and costs that were only incurred to stop a violation is contrary to the protections afforded to consumers by the Wisconsin Lemon Law. Where a violation of the statute forces a consumer to incur an expense, the consumer is entitled to be compensated.

III. THE "AMERICAN RULE" REGARDING ATTORNEY FEES DOES NOT APPLYTO LEMON LAW VIOLATIONS.

The Court of Appeals did not consider that Financial's Lemon Law violations were the cause of Kilian's attorney fees. Rather, the Court of Appeals emphasized the American Rule in denying attorney fees to Kilian. Kilian at ¶ 11. (App. 105-106). The Court of Appeals disregarded that **the fee-shifting provision** of the Wisconsin Lemon Law brings Kilian's claim within **an exception to the American Rule** and failed to reconcile application of the American Rule to a fee-shifting claim.

This Court recognized that the American Rule does not apply to a fee-shifting claim in Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58 (2004). In examining the award of attorney fees under a fee-shifting statute, this Court acknowledged that: "Under the American Rule, the parties to a lawsuit bear the cost of their own attorney fees absent legislative authorization to shift costs." Id., 275 Wis. 2d at 13, 683 N.W.2d at 64. The Kolupar Court noted that the Wisconsin legislature has authorized courts to award attorney fees to successful litigants in many contexts, including the Wisconsin Lemon Law. Id.

This Court revisited the issue in Kolupar v. Wilde Pontiac Cadillac, Inc., 2007 WI 98, 303 Wis. 2d 258, 735 N.W.2d 93 (2007), noting that: "Numerous Wisconsin statutes contain fee-shifting provisions, including those relating to consumer protection, frivolous lawsuits and privacy rights." Id., 303 Wis. 2d at 274, 735 N.W.2d at 101. The Wisconsin Lemon Law is a consumer protection statute that contains a fee-shifting provision. Accordingly, the Court of Appeals' application of the American Rule in this case is misplaced.

Moreover, Kilian is not the party that should bear the expense of his attorney fees and costs incurred in stopping Financial's violation of the Wisconsin Lemon Law. The fees necessarily incurred to block Financial's ongoing collection actions should be awarded to Kilian consistent with sec. 218.0171(7), Wis. Stats.

IV. A CONSUMER CAN RECOVER DAMAGES PURSUANT TO SEC. 218.0171(7), WIS. STATS., FOR DEFAMATION THAT IS A DIRECT RESULT OF ENFORCEMENT OF A MOTOR VEHICLE LEASE IN VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

As set forth above, a consumer can recover damages that are caused by a violation of the Wisconsin Lemon Law. Defamatory actions taken by a lessor to **illegally enforce** a lease despite the prohibition of sec. 218.0171(2)(cm)3., Wis. Stats., are directly related to a Lemon Law violation pursuant to sec. 218.0171(7), Wis. Stats. Here, it is clear that Financial defamed Kilian by reporting that his lease was in "default" to the credit bureaus for all future creditors to see that Kilian was a credit risk.

The Court of Appeals found that Kilian should have filed a separate claim for defamation. Kilian at ¶ 12. (App. 106). Why should Kilian be allowed to access the Lemon Law for his defamation claim? First, BECAUSE THE DEFAMATORY ACTIONS WERE TAKEN IN ORDER TO FORCE KILIAN TO PAY ON HIS UNENFORCEABLE LEASE. The lease was unenforceable because of the prohibitions contained in the Lemon Law. Sec. 218.0171(2)(cm)3., Wis. Stats. So, this is not an ordinary defamation case.

Second, forcing he consumer to bring his separate common law defamation case is, effectively, a bar to the claim and permits companies like Financial blackmail lessee consumers with impunity. Why? Because a consumer will be forced to bear the legal costs and attorney fees for the action. What if the defamatory damages are low - under $25,000. What lawyer will take on such a case on a contingent fee? Financial type companies will quickly "bury" these defamation claims and continue their defamatory tactics with impunity.

A consumer should not have to look beyond the Lemon Law for a remedy. Not all defamation cases may be the result of Lemon Law violations - but, when a consumer's damages are directly related to a Lemon Law violation, defamation damages should be compensable under the Lemon Law. Kilian's claim for defamation damages was directly linked to Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats. **But for Financial's attempts** to enforce the lease against Kilian, there would have been no defamatory action and no resulting damages.

Further, the Court of Appeals incorrectly found that Kilian had not established damages or a causal link between his damages and a Lemon Law violation. Id. At the very least, this is a question for the trier of fact. However, the Court of Appeals also missed the mark here as defamation damages **are presumed.** There was sufficient evidence to allow Kilian's claim for defamation damages to proceed to the jury as he was not required to prove special damages or submit any specific proof of damages because there is a **presumption of damages** where a person has been libeled:

> When defamatory matter is communicated in the form of libel, the person defamed has the benefit of **a conclusive presumption** of the existence of general damages (i.e., humiliation, injury to feelings, damages to reputation or good name), and **such presumption supports a monetary award for such damages** even without any affirmative proof on the subject at the time of trial. Russell M. Ware, et al., *The Law of Damages in Wisconsin*, Sec. 11.30, p. 21, 3d. ed. (2000). (Emphasis added.)

Similarly, certain types of defamation are actionable **without any proof of damages**. Damages are presumed to follow from defamatory statements regarding, including economic defamation: "…**business, trade,** profession or office, and unchastity to a woman. [Citation omitted.] Such slander has been referred to as "slander per se" either in the sense of being actionable without proof of special damages or of being defamatory as a matter of law." Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 459, 113 N.W.2d 135, 139 (1962). (Emphasis added.)

The United States Supreme Court has also recognized the presumption of damages for defamation: "Under the traditional rules pertaining to actions for

libel, the existence of injury is **presumed from the fact of publication**. Juries may award substantial sums as compensation for supposed damage to reputation **without any proof that such harm actually occurred**." Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S.Ct. 2997, 3011, 41 L.Ed.2d 789 (1974). (Emphasis added.) The United States Supreme Court further noted that injury resulting from defamation **is not limited to out-of-pocket loss**: "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include **impairment of reputation** and standing in the community, personal humiliation, and mental anguish and suffering." Id., 418 U.S. at 350, 94 S.Ct. at 2012. (Emphasis added.)

The same rule applies in Wisconsin. Damages resulting from defamation can be awarded without specific proof of loss. "In such cases 'proof of the defamation itself is sufficient to establish the existence of some damages so that the [fact finder] may, without other evidence, estimate the amount of damages.'" Teff v. Unity Health Plans Ins. Corp., 2003 WI App 115, 265 Wis. 2d 703, 730, 666 N.W.2d 38, 52 (Ct.App. 2003), *quoting* Starobin v. Northridge Lakes Dev. Co., 94 Wis. 2d 1, 13, 287 N.W.2d 747 (1980).

Defamation results in harm that is not necessarily quantified in dollars and cents or by mathematical calculations: "The nonpecuniary injury that damages in defamation cases compensate for include impairment to reputation and standing in the community, personal humiliation, and mental anguish and suffering." Teff, 265 Wis. 2d at 731, 666 N.W.2d at 52.

Harm to one's reputation is sufficient to establish a claim for defamation damages. "Generally, a defamatory statement is one that 'tends so to harm the reputation of another so as to **lower him in the estimation of the community** or to deter third persons from associating or dealing with him.' Such statement is actionable without specific proof of actual pecuniary damages." Denny v. Mertz, 106 Wis. 2d 636, 643, 318 N.W.2d 141, 144 (1982), *quoting* Lawrence v. Jewell Companies, Inc., 53 Wis. 2d 656, 660-661, 193 N.W.2d 695 (1972). (Emphasis added.)

Kilian should have been given the opportunity to present his claim to a jury for a factual determination as well as an award of the damages he suffered as a result of Financial's illegal collection efforts. A jury could have awarded Kilian damages even if he had no affirmative proof of pecuniary loss. Here, the evidence in the record established that Financial falsely reported information to credit bureaus regarding Kilian's lease account. The deposition testimony of Financial's own representative, Glen Bieler, confirmed the false reports:

> Q: But you are aware of Mercedes-Benz Financial reporting overdue lease payments to credit reports agencies?
>
> A: Yes.
>
> Q: Did Mercedes-Benz Financial report any information to credit bureaus regarding the lease account for the Kilian vehicle?
>
> A: I believe so, yes.
>
> ***

Q: Do you know who at Mercedes-Benz Financial reported that information?

A: Well, like I said, it's an automated system, you know. Whenever an account goes a certain past due, 30 days, or 60, or 90, then it's automatically reported.

(R. 24: 17).

Thus, Kilian established defamation damages *per se* and his defamation/Lemon Law claim. Dismissal of Kilian's claim for defamation damages was improper as he established a sufficient basis to recover such damages resulting from Financial's Lemon Law violation pursuant to sec. 218.0171(7), Wis. Stats.

CONCLUSION

Kilian must be able to enforce his Wisconsin Lemon Law rights after return of his "lemon" vehicle to Mercedes. In order for Kilian (and other similarly situated consumers) to do so, he must recover the cost of the attorney fees necessarily incurred in stopping Financial's illegal collection attempts.

Attorney fees should be awardable to Kilian under the fee-shifting provision of sec. 218.0171(7), Wis. Stats., as part of his lawsuit to block Financial's ongoing actions to collect payment from him for his motor vehicle lease. Kilian should not be required to suffer a separate pecuniary loss as his claim for rescission of the lease and relief from Financial's collection attempts were sufficient grounds to commence his action.

Kilian should be also permitted to recover his attorney fees and costs as damages pursuant to sec. 218.0171(7), Wis. Stats. Kilian would not have incurred

such damages if Financial would have ceased its efforts after being forewarned that its conduct was in violation of sec. 218.0171(2)(cm)3., Wis. Stats. Financial continued to seek payment from Kilian until he filed a lawsuit. Unfortunately, the damage was already done as Financial had notified the credit bureaus that Kilian was delinquent on his lease account. The defamation damages flowing from Financial's false credit report are also recoverable under sec. 218.0171(7), Wis. Stats., as such damages are the direct result of Financial's violation of sec. 218.07171(2)(cm)3., Wis. Stats.

Denying Kilian recovery of his attorney fees and defamation damages will do nothing to deter Financial (and other motor vehicle lessors) from repeating the same vicious cycle with other consumers. Rather than protecting Kilian's rights, he has suffered a loss as a result of Financial's Lemon Law violation. If the Court of Appeals' decision is allowed to stand consumers will be left without any recourse to protect themselves and violators will go unpunished.

Kilian respectfully requests that this Court reverse the lower court decisions and remand this action for trial.

Dated this ___ day of October, 2010.

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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 32 pages. It contains 7,934 words.

Signed:_____

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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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.

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