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SUPREME COURT OF WISCONSIN

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent-
Petitioner,

v.

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

Defendants-Respondents-Cross-Appellants.

COURT OF APPEALS, DISTRICT 2
APPEAL NO. 2009AP000538
TRIAL COURT CASE NO. 2007CV001869

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS' RESPONSE BRIEF

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INTRODUCTION

Plaintiff-Petitioner Steven T. Kilian ("Kilian") claims he is entitled to $2,434.25 in attorneys' fees incurred prior to his filing a "Lemon Law" action against Defendants-Respondents Mercedes-Benz USA, LLC ("MB"), and DaimlerChrysler Financial Services Americas, LLC ("MBF"). Both the trial court and the Court of Appeals held that Kilian is not entitled to recover these "pre-suit" attorneys' fees because the only legal basis for their recovery is the "fee-shifting" provision in Wis. Stat. § 218.0171(7), which authorizes recovery of attorney fees incurred in "Lemon Law" actions only where the consumer has *prevailed* in a Lemon Law action to recover damages. Because Kilian's Lemon Law damages claim was properly dismissed as a matter of law, Kilian had no right to recover the $2,434.25 in pre-suit fees.

Kilian also insists that the trial court and the Court of Appeals erred in summarily dismissing his claim for general or nominal defamation damages, which was based upon the proposition that MBF had incorrectly informed a credit reporting agency or agencies that Kilian was late in making

his lease payments, and that such a communication constituted "defamation per se," entitling Kilian to general or nominal damages. Kilian asserted this claim even though he had no evidence that any negative lease related credit information had been published by any credit reporting agency, or that any negative lease related information was contained in any credit report, and even though he did not claim any actual or special damage to his reputation. While both the trial court and the Court of Appeals observed that the evidence offered by Kilian did not actually establish that MBF had communicated any negative credit information to a credit reporting agency, only that such a communication may have occurred, both courts held that even if the information was sent, because no credit reporting agency published any negative credit information about Kilian, there was no

"defamation per se" warranting recovery of general or nominal damages.[1]

MB and MBF submit that to allow Kilian to proceed with a claim against a lessor under Wisconsin's Lemon Law would be inconsistent with the purpose of the Lemon Law, and would impermissibly expand the scope of the statute. The Lemon Law has always been regarded as a warranty enforcement statute intended to reduce the disparity between a motor vehicle manufacturer and the consumer by equalizing the bargaining power of the consumer in a warranty dispute. *Tammi v. Porsche Cars North America, Inc.*, 2009 WI 83, ¶28, 320 Wis. 2d 45, 768 N.W.2d 783. Kilian urges the Court to allow his claim against a lessor because it is consistent with the remedial purpose of the statute. This Court should decline to reinterpret the legislative intent and purpose of the statute

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[1] In both the trial court and the Court of Appeals, Kilian also claimed to have sustained "inconvenience damages" resulting from MBF's telephone calls and correspondence concerning overdue lease payments. Both courts rejected Kilian's claim, and Kilian did not seek review of that dismissal in his Petition for Review. Therefore, MB and MBF will not address this issue.

so broadly, thereby expanding its scope by creating an entirely new category of claims against lessors.[2]

MB and MBF also submit that the trial court and the Court of Appeals correctly determined that Kilian is not entitled to any portion of the $2,434.25 in pre-suit attorneys' fees he seeks because the *only* legal basis for such an award is the fee-shifting provision in Wis. Stat. § 218.0171(7), which is triggered only where a consumer has prevailed on a Lemon Law claim for damages. Because Kilian's Lemon Law claims for damages were all dismissed as a matter of law, there is no statutory authority for awarding Kilian any part of the $2,434.25 in attorneys' fees he seeks, even if Kilian were deemed to have "prevailed" on his lease rescission claim.

Finally, MB and MBF submit that both the trial court and the Court of Appeals correctly determined that Kilian's "defamation per se" claim for general or nominal defamation damages was without a legitimate factual or legal basis. This

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[2] Kilian argues repeatedly throughout his brief that he would be left without any remedy whatsoever if he is not able to pursue his claim against MBF under the Lemon Law. However, Kilian offers no analysis or explanation as to why he could not avail himself of the remedies provided for in the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* (2006), or any number of common law tort claims.

is so for several reasons. First, personal injury damages, such as alleged defamation damage, cannot be recovered under the Lemon Law. *See Gosse v. Navistar International Transp. Corp.*, 2000 WI App 8, ¶14, 232 Wis. 2d 163, 605 N.W.2d 896. Recovery of personal injury damages, if warranted, must be sought in a separate common law claim.

Second, Kilian failed to establish that MBF actually communicated negative credit information to any credit reporting agency -- only that such a communication may have occurred. Without sufficient evidence establishing that a potentially defamatory communication actually occurred, summary judgment was appropriate.

Third, even if, *arguendo*, MBF communicated negative credit information to a credit reporting agency via a computer generated report showing an overdue lease payment, or payments, as Kilian alleged, it is undisputed that no adverse credit information relating to any late lease payments ever appeared in any credit report. Wisconsin law provides that "defamation per se" does not occur in a case such as this one unless the false information was inherently defamatory, meaning that the information necessarily injured

the plaintiff "in his business, trade, profession or office." *See Freer v. M&I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶¶11-13, 276 Wis. 2d 721, 688 N.W.2d 756. Because negative credit information referencing any overdue lease payment never appeared in any credit report, the overdue lease payment information sent to credit agencies, if that ever occurred, was not inherently defamatory -- i.e., it did not necessarily injure Kilian in his business, trade, profession or office, and thus there was no "defamation per se."[3]

ARGUMENT

I. WIS. STAT. § 218.0171(2)(cm)3 OF THE LEMON LAW DOES NOT AUTHORIZE A CAUSE OF ACTION AGAINST A MOTOR VEHICLE LESSOR FOR ATTEMPTED "ENFORCEMENT" OF THE LEASE.

The Lemon Law is a warranty enforcement statute that was created to deal with the increasing number of disputes

[3] Although MB and MBF were defendants in Kilian's Lemon Law action, and both were parties to Kilian's appeal, the claims presented in Kilian's Petition for Review, and argued in Kilian's brief to this Court, pertain solely to MBF, not MB -- i.e., whether Kilian is entitled to attorneys' fees relating to MBF's alleged wrongful enforcement of Kilian's lease, *see* Wis. Stat. § 218.0171(2)(cm)3, and whether Kilian is entitled to seek general or nominal defamation damages against MBF for alleged defamatory statements made to credit reporting agencies. Accordingly, MB, while joining in this response brief, should not be deemed a party to this proceeding.

between manufacturers and consumers over automobile warranties. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.,* 225 Wis. 2d 305, 345-46, 592 N.W.2d 201 (1999); *Hughes v. Chrysler Motors Corp.,* 197 Wis. 2d 973, 980, 542 N.W.2d 148 (1996); *Church v. Chrysler Corp.,* 221 Wis. 2d 460, 468, 585 N.W.2d 685 (Ct. App. 1998); *Dieter v. Chrysler Corporation*, 2000 WI 45, ¶23, 234 Wis. 2d 670, 610 N.W.2d 832; *Gosse*, 2000 WI App 8, ¶¶12-13. It was never intended to provide for claims against lessors, and should not be construed in a manner which is contrary to the legislative intent: "The cardinal rule in all statutory interpretation, as this court has often said, is to discern the intent of the legislature. This court ascertains that intent by examining the language of the statute and the scope, history, context, subject matter and purpose of the statute." *Hughes*, 197 Wis. 2d at 979.

The first step in ascertaining the intent of the legislature is to examine the language of the statute, and absent ambiguity, give the language its ordinary meaning. *Gosse*, 2000 WI App 8, ¶10. If the words of the statute itself convey the legislative intent, that ends the inquiry, and there

is no need for the courts to look beyond the plain language of the statute to search for other meanings. *Varda v. General Motors Corporation*, 2001 WI App 89, ¶8, 242 Wis. 2d 756, 626 N.W.2d 346. The mere fact that parties may "interpret a statute differently does not in itself create an ambiguity." *Harnischfeger Corp. v. LIRC,* 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995).

Allowing a consumer to bring an action against a lessor under the Lemon Law would be contrary to the plain language of the statute. Nothing in the language of the statute indicates that a financial institution or other lessor should be subject to claims seeking double damages and a consumer's attorneys' fees related to a warranty dispute. The specific section of the statute at issue merely states that no person may enforce the lease against the consumer after the consumer receives a refund. Wis. Stat. § 218.0171(2)(cm)3. Thus, it makes the lease unenforceable, but does not create an entirely separate category of claims against leasing companies. *See, Tammi*, 2009 WI 83, ¶46 ("when a lessee receives a refund under § 218.0171(2)(b)3., the lease becomes unenforceable against the consumer because the consumer has returned the

vehicle."). In other words, the lease becomes legally unenforceable against the consumer once the consumer receives a refund from the manufacturer, and the lessor may pursue its own refund of the current value of the written lease from the manufacturer.[4]

Furthermore, although the statute is clear on its face, allowing a cause of action against lessors for an alleged violation of (2)(cm)3 would be contrary to the purpose behind the statute. Even where the statutory meaning is clear, "legislative history may be consulted 'to confirm or verify a plain-meaning interpretation.'" *Brunton*, 2010 WI 50, ¶17, (citing *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110). When the legislature states the purpose underlying a statute, courts

[4]The Court of Appeals did not address this underlying issue of whether a claim against the lessor even exists under the Lemon Law, and recognized that "Financial also assumes, *arguendo*, that a violation occurred." *Kilian v. Mercedes Benz USA, LLC*, 2010 WI App 62, ¶9, n. 3, 324 Wis. 2d 583, 785 N.W.2d 687. Nevertheless, the Court seemed to acknowledge that a claim may not exist: "The consumer is protected because Wis. Stats. § 218.0171(2)(c)m3., declares that the lease is unenforceable once the consumer receives a refund." *Id.* at footnote 2. Instead, the Court analyzed the issue that was decided by the trial court, namely whether Kilian had suffered any damages, and merely assumed "that Financial's phone calls and notices to Kilian that he was in default were in violation of this provision as an attempt to enforce the lease after Kilian received his refund." *Id.* at ¶ 9.

are to interpret the statute in light of that purpose. *Kalal*, 2004 WI 58, ¶49.

The purpose of the Lemon Law was to improve auto manufacturers' quality control, and reduce the inconvenience, the expense, the frustration, the fear and the emotional trauma that lemon owners endure. *Hughes*, 197 Wis. 2d at 982. As a result, the Lemon Law has always been interpreted to apply only to manufacturers, and it is the manufacturers' refusal to replace or repurchase a lemon vehicle which triggers the remedies in Wis. Stat. § 218.0171(7). *Dieter*, 2000 WI 45, ¶26; *Hughes*, 197 Wis. 2d at 982 ("The Wisconsin Lemon Law is violated when the manufacturer fails to voluntarily replace or repurchase the lemon vehicle within 30 days after receipt of the consumer's ... demand. This failure to voluntarily comply with the Lemon Law establishes a violation of the law and triggers the [§ 218.0171(7)] remedies of the law.") *See also*, *Tammi*, 2009 WI 83, ¶¶ 2, 37, 38, 50, 58-60.

The legislative history also makes clear that the addition of § 218.0171(2)(cm)3 to the law in 1987 was not intended to provide consumers with a new category of claims

against lessors, but merely extended the same remedies to consumers who leased vehicles as were previously available only to consumers who had purchased vehicles. Moreover, the analysis by the Legislative Reference Bureau makes clear that the intent of the bill was to treat lessors the same as other motor vehicle purchasers by allowing motor vehicle lessors to bring claims against manufacturers for double damages, costs, attorney fees, and other forms of relief:

> Currently the law governing repair, replacement and refund under a motor vehicle warranty, commonly called the 'lemon law', provides remedies for a motor vehicle owner or a person who may enforce a motor vehicle warranty. This bill extends the remedies available under the 'lemon law' to a person who leases a motor vehicle under a written lease.
>
> The bill describes the remedies available to lessees and to other consumers. With respect to a leased motor vehicle with a nonconformity which cannot be repaired, a manufacturer must accept return of the motor vehicle, refund the current value of the lease to the motor vehicle lessor and other security interest holders, and refund to the consumer the amount paid under the lease plus sales tax and collateral costs, minus a reasonable allowance for use. The bill specifies the method of calculating the current value of the lease and the reasonable allowance for use.
>
> With respect to any other motor vehicle with a nonconformity which cannot be repaired, the manufacturer must, as under current law, accept return of the motor vehicle and either replace it or refund the full purchase price plus any sales tax, finance charge, amounts paid at sale and collateral costs associated with the repair, minus a reasonable allowance for use.

> This bill permits a motor vehicle lessor, like a motor vehicle purchaser, to recover damages caused by certain violations of the 'lemon law'. A prevailing motor vehicle lessor may recover twice the amount of any pecuniary loss, costs, disbursements and reasonable attorney fees and any appropriate equitable relief.
>
> The bill applies to any motor vehicle leased on or after the bill's effective date.

Analysis by Legislative Reference Bureau, 1987 Assembly Bill 188.

The plain language of this statute, supported by the legislative intent, the purpose of the statute, along with the legislative history, clearly indicate that Wis. Stat. § 218.0171(2)(cm)3 was never intended to create an entirely new category of claims against the lessors who unwittingly contact the lessee after the lessee has received a refund from the manufacturer, under a strained interpretation of the law that the lessor's contacts were attempted "enforcement" actions.

Wis. Stat. § 218.0171(2)(cm)3 should be interpreted consistent with the plain language, the history, scope, and purpose of the statute, which all indicate that the lease merely becomes unenforceable upon the consumer's receipt of a refund, and that the statute does not provide a means for

consumers to pursue claims against lessors for actions which a consumer contends are an attempted enforcement of the lease. See, *Gosse*, 2000 WI App 8, at ¶¶ 13-14 (allowing recovery for personal injury damages would be contrary to purpose of Lemon Law, and would impermissibly expand the scope of the statute); *Varda*, 2001 WI App 89, at ¶¶ 36-38 (refusing to allow recovery of purchase price of vehicle after expiration of lease as inconsistent with plain language of the statute and contrary to the purpose of the Lemon Law). Therefore, Kilian has no viable claim against MBF under the Lemon Law for what Kilian claims are prohibited "enforcement" actions.

II. KILIAN IS NOT ENTITLED TO RECOVER $2,434.25 IN PRE-SUIT ATTORNEYS' FEES, EITHER AS A DISCRETE ELEMENT OF "LEMON LAW DAMAGES," OR PURSUANT TO THE FEE-SHIFTING PROVISION IN WIS. STAT. § 218.0171(7).

A. Attorney Fees Incurred In Pursuing A Lemon Law Claim, Whether Incurred Pre-Suit, During Suit, or Post-Suit, Do Not Constitute Lemon Law "Damages" As Kilian Claims.

The Court of Appeals held that "Wisconsin follows the American Rule with respect to attorney fees meaning that

[with certain exceptions not relevant here], attorneys' fees may not be awarded unless authorized by statute or by a contract between the parties." (A-Pet., pp. 105-106, ¶11). The court then held that "although Wis. Stat. § 281.0171(7) permits an award of attorney fees, that does not authorize the award as pecuniary damages and the entitlement to suit related attorney fees, including time spent before the suit is filed, *see Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1, 18-19, 523 N.W.2d 197 (Ct. App. 1994), *aff'd.*, 197 Wis. 2d 973, 542 N.W.2d 148 (1996), *is only triggered when the consumer prevails in the litigation*." (*Id.*). (emphasis added).

Although Kilian argues that "damages [under Wis. Stat. § 218.0171(7)] should include . . . pre-suit attorney fees," (Kilian Br., p. 21), Kilian cites no authority for this proposition; moreover, he acknowledges that pre-suit attorney fees are recoverable under *Hughes* only if they come within the scope of the fee-shifting provision in Wis. Stat. § 218.0171(7), -- that this fee-shifting provision is an exception to the American Rule. (Kilian Br., pp. 24-26). In short, Kilian effectively (and correctly) concedes that the pre-suit fees at issue, $2,434.25, are not recoverable in this case

as "damages" or "pecuniary loss," because the American Rule forecloses that result. Rather, Kilian argues that the American Rule does not preclude recovery of those fees here because they are recoverable under the fee-shifting provision in Wis. Stat. § 218.0171(7). Thus, the *only* issue is whether Kilian is entitled to recover the pre-suit fees he seeks, $2,434.25, under that fee-shifting provision.

B. The Court Of Appeals Correctly Held That Kilian Was Not Entitled To An Award of Pre-Suit Attorneys' Fees Because Kilian Did Not Prevail In His Lemon Law Action Seeking Damages.

Kilian's complaint sought rescission of the lease and damages (including pecuniary loss). (R. 1). Shortly after Kilian filed his July 10, 2007 Lemon Law complaint, MBF acknowledged that the lease was effectively rescinded due to Kilian's return of the vehicle to MB. (Kilian Br., pp. 4, 14-15, 20).[5]

[5] MB paid Kilian's lease in full to MBF on August 29, 2007, approximately six weeks after Kilian filed his Lemon Law action. (R. 38:21-23). It is undisputed that Kilian's Lemon Law damages action continued for several years, until February 6, 2009, when the trial court entered an Order and Judgment dismissing all of Kilian's claims. (R. 77, 88-89). While the Court of Appeals did not deem Kilian's damage claims to be frivolous, the Court held that it was "obvious" Kilian was not entitled to Lemon Law damages. (A-Pet., p. 105, ¶10, n. 4).

Kilian nevertheless claims that he is entitled to his pre-suit attorneys' fees in the amount of $2,434.25 because he "prevailed" on his rescission claim -- that the Lemon Law suit he filed on July 10, 2007 "blocked" MBF's enforcement of the lease and caused MBF to acknowledge that the lease was terminated. (Kilian Br., pp. 14-15, 18-21). Assuming, *arguendo*, that Kilian correctly asserts that it was the filing of his Lemon Law action that resulted in lease termination i.e., that Kilian "prevailed" in obtaining lease rescission, the Court of Appeals correctly held that the fee-shifting provision in Wis. Stat. § 218.0171(7) is not triggered unless the consumer prevails in an action to recover damages caused by a Lemon Law violation.

Section 218.0171(7) provides:

> 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. (emphasis added).

Kilian claims that this fee-shifting provision is triggered if the consumer prevails with respect to any aspect of his/her Lemon Law claim -- that the consumer need not establish a

right to damages in order to recover attorney fees. But Section 218.0171(7) cannot be interpreted in this fashion; it unambiguously provides that the consumer must prevail in an action seeking damages.

The purpose of statutory interpretation is to ascertain the intent of the legislature and give it effect; the first step is to examine the language of the statute, and, absent ambiguity, give the language its ordinary meaning. *Gosse,* 2000 WI App 8, ¶10. Here, Wis. Stat. § 218.0171(7) is unambiguous -- it provides that attorney fees shall be awarded where the consumer prevails "in such action," -- referring to "an action to recover for any damages caused by a violation of [the Lemon Law]." Indeed, Wis. Stat. § 218.0171(7) expressly distinguishes remedies other than damages caused by a Lemon Law violation, and it expressly distinguishes equitable relief from an award of damages; only the latter entitles the consumer to recover attorneys' fees when the consumer "prevails."

The Court of Appeals correctly held that § 218.0171(7) requires the trial court to award costs, disbursements and attorney fees only where the consumer prevails "in an action

to recover any damages caused by a violation [the Lemon Law]." Section 218.0171(7) does not authorize an award of attorney fees where the consumer prevails in obtaining non-monetary relief. Kilian failed to establish any right to damages resulting from MBF's alleged wrongful enforcement of the lease; indeed, both the trial court and the Court of Appeals rejected Kilian's Lemon Law damage claims as a matter of law. Thus, Kilian has no right to recover any part of the $2,434.25 in pre-suit attorneys' fees he seeks.[6]

III. KILIAN'S CLAIM FOR GENERAL OR NOMINAL DEFAMATION DAMAGES WAS PROPERLY REJECTED BY BOTH THE TRIAL COURT AND THE COURT OF APPEALS.

A. The Lemon Law Does Not Authorize Recovery Of Personal Injury Damages.

In *Gosse,* the Court of Appeals held that personal injury damages may not be recovered for a Lemon Law violation:

[6] If Wis. Stat. § 218.0171(7) were interpreted to authorize an award of attorney fees where a consumer prevails on any aspect of his/her Lemon Law action, the trial court would have to determine how much of Kilian's attorney fees claim, here $2,434.25, was attributable to the successful portion of Kilian's Lemon Law action, i.e., obtaining acknowledgment that the lease was terminated, as opposed to the rest of Kilian's claims which proved entirely unsuccessful. *See Chmill v. Friendly Ford-Mercury*, 154 Wis. 2d 407, 415-16, 453 N.W.2d 197 (Ct. App. 1990).

We conclude that the words 'any damages' in § 218.015(7), Stats., [now 218.0171(7)], are ambiguous. Reasonable people might disagree as to whether, by using the words 'any damages,' the legislature intended to allow a consumer to recover personal injury damages in a Lemon Law action. Thus, we will interpret the language of § 218.015(7) within the context of the Lemon Law's purpose."

* * *

We conclude that interpreting the language of § 218.015(7), Stats., to allow recovery for personal injury damages would be contrary to the purpose of Wisconsin's Lemon Law. As we stated in *Church v. Chrysler Corp.*, the 'Lemon Law was enacted to deal with an increasing number of warranty disputes between manufacturers and consumers.'. . . The Lemon Law was enacted to give consumers a means by which to ensure that a newly purchased vehicle would conform to its warranty. Allowing a consumer to seek personal injury damages under the Lemon Law does not further that purpose.

Considering the Lemon Law's purpose, § 218.015(7), Stats., does not allow a consumer to seek personal injury damages for a Lemon Law violation. Section 218.015(7) allows the consumer to bring an action 'to recover for any damages caused by a violation of this section.' The Lemon Law is violated when a vehicle does not conform to the express warranty, and the manufacturer does not fix the nonconformity, replace the vehicle, or give the consumer a refund. To interpret § 218.015(7) to mean that personal injuries could be caused by a violation of the Lemon Law would impermissibly expand the scope of the statute. Section 218.015(7) gives the consumer a means by which to enforce the warranty provided by the manufacturer. . . . As § 218.015(5) provides, Gosse was not precluded from asserting a second claim under another law to recover damages for personal injuries he asserts were caused by a defective truck. However, the Lemon Law does not permit a consumer to enforce a warranty by claiming damages for personal injuries. If a vehicle's construction is so defective that it causes injury to the consumer, the consumer can both pursue Lemon Law remedies to get the vehicle repaired, replaced, or to

> obtain a refund, and bring a separate claim for personal injuries under appropriate law.

Gosse, 2000 WI App 8, at ¶¶11, 13-14.

Because alleged defamation damages constitute personal injury damages, under *Gosse*, Kilian was required to bring a separate common law claim for defamation rather than tack on a defamation claim resulting from MBF's alleged violation of the Lemon Law. The Court of Appeals correctly held that, under *Gosse*, the Lemon Law does not allow a consumer to recover personal injury damages for a Lemon Law violation.

Indeed, if the law were otherwise, the Lemon Law would impose strict or absolute liability upon manufacturers for failure to cure any vehicle nonconformity where that nonconformity later results in personal injury. Wis. Stat. § 218.0171(2)(a) provides:

> If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the motor vehicle lessor or any of the manufacturer's authorized motor vehicle dealers and makes the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be repaired.

Under this provision, if the manufacturer, the motor vehicle lessor or any of the manufacturer's authorized motor vehicle dealers fail to timely repair a nonconformity, or if the manufacturer or motor vehicle lessor fails to provide a timely refund or a replacement vehicle as provided in Wis. Stat. § 218.0171(2)(b), the manufacturer would be liable for any personal injuries caused by the nonconformity, regardless of whether the manufacturer, the motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers were negligent in failing to repair that nonconformity. The legislature could not have intended that the Lemon Law would displace the common law of torts to impose absolute liability for personal injury resulting from breach of contract -- i.e., breach of warranty. But that is the result if Kilian correctly asserts that personal injury damages can be recovered for breach of a Lemon Law duty.

The Court of Appeals appropriately determined that the Lemon Law does not displace the common law of torts where personal injury damages are claimed to have resulted from breach of the Lemon Law; consumers may bring a common law tort claim along with a Lemon Law claim, but

the Lemon Law does not provide a separate legal basis for recovery of personal injury damages.

B. Kilian Failed To Produce Sufficient Evidence That Any Information Capable Of Defamatory Meaning Was Communicated To Anyone.

Throughout his brief, Kilian represents to this Court that MBF "reported information to the credit bureaus regarding Kilian's unpaid lease account," and that MBF "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." (Kilian Br., pp. 4, 6, 20, 26). Kilian also asserts that the evidence in the record established that MBF "falsely reported information to credit bureaus regarding Kilian's lease account," referencing the deposition testimony of an MBF representative, Glen Bieler. (Kilian Br., pp. 30-31). Kilian's representations to this Court are disingenuous at best.

In his brief, pp. 30-31, Kilian quotes from a portion of Mr. Bieler's deposition testimony as establishing that MBF sent adverse credit information regarding Kilian's late lease payments to credit reporting agencies, but the passage quoted

by Kilian fails to establish that any adverse credit information was actually sent by MBF. Mr. Bieler testified that, as a general proposition, MBF's automated system did report overdue lease payments to credit reporting agencies whenever an account was past due for some period of time, which could have been 30, 60 or 90 days after a missed payment, but Mr. Bieler was unsure what the time period might be and was unsure whether any late payment information concerning Kilian had been sent by automated transmittal.[7] Mr. Bieler's relevant, and complete, deposition testimony reads as follows:

> Q: Was Mercedes-Benz Financial going to report negative credit information regarding Mr. Kilian?
>
> A: Well, like I said, if there's a balance due on the account it's possible that, you know, that the, depending on how far past due, the system automatically, or does mar credit depending on when the payment, you know how far past due the account is. That's done, again, automatically by our system.
>
> Q: So, the notice to credit reporting agencies is also automated?
>
> A: Yes, as far as I know, yes.
>
> Q: And Mercedes-Benz Financial has access to consumer lessee's credit reports?

[7] While Mr. Bieler testified that MBF reported information to credit bureaus regarding Kilian's lease account, Mr. Bieler was unsure whether any late payment information had ever been submitted regarding the Kilian lease.

A: From what -- I'm not in that department that handles that, so I don't know for sure. But I really couldn't answer that, but I assume so. . . .

* * *

Q: But you are aware of Mercedes-Benz's 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 what was reported?

A: I can't recall exactly, no.

Q: Do you know when that was done?

A: I don't know for sure when, no.

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, p. 17).

The above testimony establishes that, Kilian's contrary representation to this Court notwithstanding, Mr. Bieler's testimony did not establish that MBF had actually sent any adverse credit information to credit bureaus. At most, Bieler's testimony indicates that there was a distinct

possibility that such information had been sent via automated report, but Bieler was unsure. Kilian never offered any evidence establishing that such a communication actually occurred. Both the trial court and the Court of Appeals recognized this fact; the former observed:

> And even that [Mr. Bieler's testimony] and all the documentation states with some -- some ambiguity as to whether the report was made. Sounds like it was probably made to a credit agency. There's a great likelihood that some report was made to a credit agency. . . . And so . . . it's probably reported but it's not indicated with any certainty, and there's nothing on the record, no affidavit, no indication from a bank or somebody who grants loans, a financial agent, a credit reporter that Mr. Kilian is in a bad way now. Correct if I'm wrong. Is there any -- anything that says Mr. Kilian's --
>
> MS. GRZESKOWIAK [Kilian's attorney]: there's nothing in the record. . . .

(R. 94, pp. 24-26).

Similarly, as the Court of Appeals noted: "Kilian's claim for damages for the *possible* false reporting of default to credit bureaus fails because he did not offer evidence that his credit was in fact injured by Financial's collection efforts. *At best* the record indicates that, by an automated generated notice, information about Kilian's overdue lease payments was reported to credit bureaus. . . ." (emphasis added). (A-Pet. p. 106, ¶12).

Accordingly, even if Kilian could assert a personal injury claim based on a purported Lemon Law violation, Kilian failed to produce sufficient evidence establishing that MBF informed any credit reporting agency that Kilian was tardy in making any lease payment. As the Court of Appeals observed in *Freer*, 2004 WI App 201, ¶¶4, 7: "Wis. Stat. Rule 802.03(6) requires that: "In an action for libel or slander, the particular words complained of shall be set forth in the complaint.' . . . In order to survive summary judgment, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material 'set[ting] forth specific facts,' Wis. Stat. Rule 802.08(3), pertinent to that element, *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290-292, 507 N.W.2d 136 (Ct. App. 1993)."

Not only did Kilian fail to identify the particular words complained of, but Kilian failed to provide a sufficient evidentiary basis to establish that MBF actually made any communication to a credit reporting agency or agencies to the effect that Kilian was late in making his lease payments. Mr.

Bieler's deposition testimony did not suffice -- Kilian easily could have obtained evidence disclosing whether any such communication ever occurred but did not do so.

For each of the above reasons, even if Kilian could predicate a personal injury damages claim upon MBF's violation of the Lemon Law, the trial court properly granted MBF's summary judgment, and the Court of Appeals properly affirmed that determination. The fact that MBF *may* have provided credit agencies with information of Kilian's late lease payments does not satisfy Kilian's burden to establish that such communication *actually* occurred.

C. Even If MBF Had Reported Overdue Lease Payment Information To A Credit Agency, Kilian Did Not Assert A Viable Defamation Per Se Claim Against MBF.

Even if it were assumed, *arguendo*, that MBF's automated system did send information to a credit agency or agencies indicating that Kilian was late in making lease payments, under well-established Wisconsin law, that statement cannot be regarded as defamatory per se, as Kilian

claims.[8] Because Kilian admits there is no evidence that any credit agency ever reported negative credit information concerning any late payment on the Kilian lease, i.e., there is no evidence that any such negative credit information ever showed up in any Kilian credit report, the issue is whether late payment information communicated solely to a credit agency, and not published by that agency, is defamatory per se. Because credit information disclosing that Kilian was late in making lease payments is not inherently defamatory under Wisconsin law, Kilian's claim of defamation per se, purportedly entitling Kilian to general or nominal damages, was appropriately dismissed by both the trial court and the Court of Appeals.

In *Freer, supra*, the Court of Appeals, relying on RESTATEMENT (SECOND) OF TORTS § 570 (1977), held that defamation per se, permitting recovery of general or nominal

---

[8] Because it is undisputed that Kilian claimed no "special damages" from MBF's alleged communication of negative credit information to credit agencies, Kilian can recover in defamation only if the negative credit information communicated to credit agencies (assuming any information actually was communicated) was defamatory per se. *See Freer*, 2004 WI App 201, ¶¶7-11.

damages without proof of actual or special damages, "is limited to the following four narrow circumstances:

- 'imputation of certain crimes' to the plaintiff; or
- 'imputation . . . of loathsome disease' to the plaintiff; or
- 'imputation . . . of unchastity to a woman' plaintiff; or
- defamation 'affecting the plaintiff in his business, trade, profession, or office.'"

Freer, 2004 WI App 201, ¶11.

As in *Freer*, the only category relevant in this case is the last -- requiring plaintiff to show that, under the particular circumstances, the alleged defamatory statement was inherently damaging to plaintiff's business, trade, profession or office. Here, as in *Freer*, the alleged defamatory statement at issue -- a representation to a credit agency that an individual is late in making a lease payment -- fails to meet this exacting standard as a matter of law.

First, as the court observed in *Freer*:

> It is settled in Wisconsin that words are not [defamatory] per se if anything other than the words are needed to make them defamatory. . . . The defamation must be 'apparent from the words themselves.' 'Words which are defamatory per se do not need an innuendo, and, conversely, words which do need an innuendo are not defamatory per se.'

Freer, 2004 WI App 201, ¶12. Here, not only has Kilian failed to provide the statement purportedly sent to credit agencies regarding Kilian's late lease payments, but even if such a statement had been communicated to a credit agency or agencies, a statement reflecting that an individual missed a lease payment is not "inherently defamatory." There could be a myriad of reasons for such a late payment; indeed, the information could be faulty, which is not an uncommon occurrence. In order for such erroneous information to be defamatory at all, innuendo is required -- i.e., Kilian did not simply inadvertently omit to make a lease payment, but that the late payment likely resulted from Kilian's lack of fiscal responsibility or inadequate financial resources, rendering Kilian a significant and unacceptable credit risk.

Whether language is defamatory per se -- i.e., inherently defamatory -- is an issue of law for the court.

Freer, 2004 WI App 201, ¶8. Here, MBF respectfully submits that even if there had been some communication to a credit agency indicating that Kilian was late in making a lease payment, such a communication is not inherently defamatory -- innuendo is required -- i.e., that the missed payment was accurately reported and resulted from Kilian's lack of resources or responsibility, this rendering him a poor credit risk.

Second, and more importantly, even if innuendo were not required, it is undisputed that Kilian produced no evidence that any negative credit information relating to his lease was ever published by any credit agency, or that any negative credit information relating to his lease is or was contained in any credit report or credit file. Under *Freer*, the issue, then, is whether a single report to a credit agency indicating that Kilian was late in making a lease payment was "inherently damaging to Kilian's business, trade, profession or office."

Because Kilian's business does not depend upon the content of information transmitted to a credit agency where that information is never published to anyone with whom

Kilian does business, and is not contained in any credit file susceptible to review by anyone or any entity with whom Kilian does business, that information, even if inaccurate, could not cause inherent injury to Kilian's business.[9] Accordingly, even if late payment information had actually been communicated by MBF to a credit agency, which Kilian failed to establish, under *Freer*, that information, which was not communicated to any person or entity with whom Kilian might do business, was not "defamatory per se."

CONCLUSION

MB and MBF respectfully submit that § 218.0171(2)(cm)3 does not support a Lemon Law claim against lessors who mistakenly contact a consumer regarding lease payments after the consumer has received a refund from the manufacturer. Permitting a Lemon Law claim against lessors, such as MBF, is contrary to the scope, history, context, subject matter and purpose of the statute, as well as its legislative history. If Kilian had sustained personal

[9] Kilian introduced no evidence as to the nature of his business, trade, profession, or office, and made no attempt to even argue in his brief that his circumstances warranted application of the fourth narrow circumstance recognized by *Freer* permitting general damages without proof of actual damages.

injuries as a result of a defamatory statement made by MBF, of which there was no evidence, then his remedy would be based upon common law, not the Lemon Law.

Alternatively, MB and MBF respectfully submit that both the trial court and the Court of Appeals correctly denied the $2,434.25 in attorney fees Kilian seeks for having "prevailed" on his lease rescission claim. Section 218.0171(7) authorizes an award of attorney fees only where the consumer has prevailed in a Lemon Law claim for monetary damages. Kilian's claims for monetary damages were properly dismissed as a matter of law; hence, Kilian is not entitled to any portion of the fees he seeks.

MB and MBF also submit that both the trial court and the Court of Appeals properly dismissed Kilian's "defamation per se" claim for general or nominal damages. The Lemon Law does not authorize a claim for personal injury based upon a Lemon Law violation, and even if it did, Kilian not only failed to establish the existence of any potentially defamatory communication to a third party, but the alleged misinformation sent to a credit agency, unseen by any person

or entity with whom Kilian might do business, cannot be deemed as "defamatory per se."

Respectfully submitted this 3rd day of November, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats. for a brief produced with a proportional serif font. The length of this brief is 6, 822 words.

Respectfully submitted this 3rd day of November, 2010.

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I hereby certify that:

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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 3rd day of November, 2010.

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