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.

REPLY BRIEF OF PETITIONER, STEVEN T. KILIAN

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

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I. KILIAN ESTABLISHED A CLAIM FOR DEFAMATION DAMAGES FLOWING FROM FINANCIAL'S VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

Kilian established a claim for defamation damages. The deposition testimony of Financial's own representative, Glen Bieler, supports Kilian's claim. Relying upon Bieler's testimony in the following question and answer, Financial misconstrues Bieler's statements, arguing that there was only a *possibility* of false reporting regarding Kilian's account:

> Q: Was Mercedes-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. (Emphasis added.)

(R. 24: 17). Bieler used the word "possible" in reference to the amount of time the account is past due. Once it reaches a specified length of time, reporting to the credit agencies is a certainty:

> 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). There is a 300% difference in the 30, 60 or 90 day periods Bieler identified. Regardless of what time period applies, according to Financial, Kilian's account was over 90 days past due. Kilian's first missed payment was

May 21, 2007 and the lease was not paid off until August 29, 2007. (R. 39: 9; R. 38: 21-23). Since Kilian's account was over 90 days past due, it was automatically reported:

Q: So, the notice to credit reporting agencies is also automated?

A: Yes. As far as I know, yes.

(R. 24: 17). Based upon Bieler's testimony regarding the automated system, its automatically reported once the requisite time period passes. Further, regardless of the time computation, Bieler admitted that Financial did **in fact** report Kilian's account:

Q: Did Mercedes-Benz Financial report any information to credit bureaus regarding the lease account for the Kilian vehicle?

A: I believe so, yes.

(R. 24: 17). Financial and its representatives are familiar with the system and what was reported as its Financial's system. The above admission was **never retracted or corrected** by Financial. Bieler also testified that the automated notices **cannot be stopped**:

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 due 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.

(R. 24:17). Bieler admitted that reports were made regarding Kilian's account—and Financial let his testimony stand. How can Financial allege that

Killian was "disingenuous" by asserting he was defamed? (See p. 22 of Response Brief). Despite Financial's bold assertion, according to Bieler and the automated system procedures, information was reported regarding Kilian. It was not just a possibility.

The trial court also noted Bieler's testimony regarding the reporting by Financial: "Sounds like it was probably made to a credit agency. There's a great likelihood that some report was made to a credit agency." (R. 94: 25).

Given Bieler's testimony regarding automatic reporting and acknowledgement that information was reported regarding Kilian's account, the record demonstrates that Financial did indeed report Kilian's overdue lease account to credit agencies. This is sufficient evidence to support Kilian's defamation damages claim.

Kilian was not required to submit proof of monetary 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). Unless Kilian applied for a loan and was denied due to his "marred" credit report, it would be impossible to prove direct monetary damages flowing from the false credit report. That is precisely why an injured party can seek recovery for defamation *per se*. Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 459, 113 N.W.2d 135, 139 (1962). As for damages, Bieler admitted that the automated notices sent to credit agencies by Financial "mar" credit.

A. Kilian Sought To Be Restored To Where He Was At The Time He Leased The "Lemon."

Financial's reliance on Gosse v. Navistar International Transportation Corp., 2000 WI App 8, 232 Wis. 2d 163, 605 N.W.2d 896 (Ct.App. 1999), is misplaced. The consumer in Gosse sought to recover under the Wisconsin Lemon Law for injuries he suffered due to a vibration nonconformity. The Gosse Court found that allowing recovery for personal injury damages would be contrary to the Lemon Law's purpose. Id., 232 Wis. 2d at 171-172, 605 N.W.2d at 901-902.

Unlike Gosse, Kilian is seeking damages related to his attempts to *fulfill* the Lemon Law's purpose. This Court has noted that purpose of the Wisconsin Lemon Law is to restore consumers to the position they were in at the time of purchase or lease of a "lemon" vehicle. Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 976, 542 N.W.2d 148, 149 (1996); Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis. 2d 670, 684, 610 N.W.2d 832, 838 (2000). Kilian filed suit to be returned to his position when leased his "lemon" vehicle. After the vehicle was retuned, Kilian was left with an outstanding lease obligation of over $95,000 and lease that the lessor refused to terminate. (R. 38: 21-23). Kilian was nowhere near being restored to his original position. Kilian also had to contend with Financial's calls, demands for payment and false reports to credit agencies. Kilian must be compensated for his damages resulting from Financial's violation in order to be restored to where he was at the time he leased his "lemon."

B. Kilian's Damages Are The Result Of Financial's Violation.

Despite Financial's concerns, allowing Kilian to recover defamation damages will not open floodgates or expand manufacturer liability under the Lemon Law. The consumer's alleged personal injury damages resulting from the nonconformity in Gosse are far removed from Kilian's defamation damages claim. Kilian's damages flow from Financial's willful act in violation of the Lemon Law. Financial took affirmative action to collect payment after Kilian returned the vehicle and continued its attempts after being notified that he returned the vehicle under the Lemon Law. (R. 38: 21, 30-45).

Further, Kilian was not required to bring a separate action under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*. Financial violated the prohibition against enforcement of a lease under sec. 218.0171(2)(cm)3., Wis. Stats. Kilian suffered damages as a direct result and had a right to pursue Lemon Law relief.

II. CONSUMERS HAVE A RIGHT TO BRING AN ACTION AND RECOVER DAMAGES FOR A VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

When the Lemon Law was modified to add coverage for leased vehicles and lessees, the legislature included an explicit provision to prohibit enforcement of a lease against a consumer after return of a "lemon" vehicle as set forth in sec. 218.0171(2)(cm)3., Wis. Stats. Yet, Financial urges this Court to find that consumers **have no rights** when this provision is violated. Section 218.0171(2)(cm)3., Wis. Stats., must be construed to allow consumers to bring an action and seek a remedy when a violation occurs.

A. By Not Briefing This Issue In The Court of Appeals, Financial Waived The Issue.

Financial **did not appeal** whether the Lemon Law authorizes a cause of action against a lessor. Nor did Financial challenge Kilian's right to sue pursuant to sec. 218.0171(2)(cm)3., Wis. Stats., at the Court of Appeals. This issue was not raised in Kilian's petition for review as the trial court correctly determined that a consumer may bring a cause of action for violation of sec. 218.0171(2)(cm)3., Wis. Stats. Accordingly, **this issue is not before this Court**. Sec. 809.62(6), Wis. Stats. *See also* State v. Scheidell, 227 Wis. 2d 285, 288, 595 N.W.2d 661, 664, n. 1 (1999). How can Financial now raise in this Court a crucial issue that it failed to brief in the Court of Appeals? Simply put, it cannot.

B. Financial Disregards Standard Rules Of Interpretation.

While this issue was not raised, the Court of Appeals acknowledged that Financial's conduct may have violated the prohibition against enforcement. "We assume 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." Kilian at ¶ 9. The Court of Appeals also noted that: "It appeared that Financial had violated the Lemon Law by trying to enforce the lease." Id., at ¶ 18.

Despite the Court of Appeals' decision and the clear language of the statute, Financial now seeks to bring this issue before the Court. Financial disregards the rules of statutory interpretation as there is no need to look beyond

the statutory language. "When the language of a statute is unambiguous, we need look no further." Vultaggio v. General Motors Corp., 145 Wis. 2d 874, 429 N.W.2d 93 (Ct.App. 1988).

Statutory interpretation begins with the language of the statute. "When examining the statutory language, 'if the plain meaning is clear, a court need not look to the rules of statutory construction or to extrinsic sources of interpretation.' [Citation omitted.] Moreover, '[a] statute is not ambiguous merely because the parties disagree as to its meaning.'" Tammi v. Porsche Cars North America, Inc., 2009 WI 83, 320 Wis. 2d 45, 60, 768 N.W.2d 783, 791 (2009), *quoting* DaimlerChrysler v. LIRC, 2007 WI 15, 299 Wis. 2d 1, ¶ 37-38, 727 N.W.2d 311 (2007).

Financial does not allege that sec. 218.0171(2)(cm)3., Wis. Stats., is ambiguous. Nevertheless, Financial looks to the legislative history and manufactures an intent, or lack thereof, behind the statute claiming that the legislature did not intend to create an actionable right under sec. 218.0171(2)(cm)3., Wis. Stats. Curiously, the legislative history cited by Financial is silent regarding sec. 218.0171(2)(cm)3., Wis. Stats., and does not mention the prohibition against enforcement of a lease after a vehicle is returned.

Section 218.0171(2)(cm)3., Wis. Stats., is clear: "No person may enforce the lease against the consumer after the consumer receives a refund due under par. (b)3." Enforcement of a vehicle lease after the consumer returns the vehicle to the manufacturer is prohibited. There is no ambiguity in this language. Any person

that enforces a lease in violation of this section is subject to a claim, whether it is the lessor, financial institution or any other person or entity. The provisions of sec. 218.0171(7), Wis. Stats., allow consumers to sue for a violation of any section of the Lemon Law: "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."

Contrary to Financial's assertions, the Court of Appeals has recognized that the remedies afforded to consumers pursuant to sec. 218.0171(7), Wis. Stats., are not limited to claims for violation of the repair or replacement provisions of sec. 218.0171(2)(b), Wis. Stats. (See p. 10 of Response Brief). "Had the legislature intended to limit the availability of actions under sec. 218.015(7) to those arising under subsec. (2)(b) rather than the section as a whole, it could have easily done so." Vultaggio, 145 Wis. 2d at 890-891, 429 N.W.2d at 99.

In Tammi, this Court recognized the provisions of sec. 218.0171(2)(cm)3., Wis. Stats. "Once the consumer returns the vehicle and receives his refund under (2)(b)3., the lease becomes unenforceable against the consumer." Id., 320 Wis.2d at 69, 768 N.W.2d at 795. Protecting consumers from enforcement of a lease after return of the "lemon" is a critical component of the relief afforded to consumers under the Lemon Law. "Put differently, 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." Id., 320 Wis. 2d at 70, 768 N.W.2d at 795.

C. Financial's Argument Leaves Consumers At The Mercy Of "Automated Collection Systems."

As stated above, Kilian's first missed payment was May 21, 2007 and the lease was not paid off until August 29, 2007. (R. 39: 9; R. 38: 21-23). Since Kilian's account was more than 90 days past due, it was automatically reported. Under Financial's interpretation of sec. 218.0171(2)(cm)3., Wis. Stats., consumers can do nothing but tolerate "automated" illegal collection attempts—consumers are forced to sit back and wait to be sued for defaulting on the lease. Meanwhile, the lessor reports them to the credit agencies, marring their credit rating. Then once sued, all the consumer has to do is hire an attorney at his own expense, and he easily wins the case! Why should consumers be required to bear this expense when the Lemon Law protects consumers by mandating their attorney fees shall be paid by the opposing party? Financial does not explain.

Possibly worse, as happened here, often a creditor does not sue. They just continue reporting the consumer's bad debt to the various credit agencies until the consumer cannot get another loan—or lease. If the consumer cannot get a loan or lease, they cannot replace the "lemon" they returned! The consumer, as here, is virtually forced to **expend the costs of filing suit** and paying attorneys to expunge the lease. However, it's not easy to get the credit agencies to reverse the filings in a timely fashion. *See* National Consumer Law Center, Automated Injustice, January 2009, at www.consumerlaw.org (Supplemental App. 249-293); *see also*

Bob Sullivan, How to Complain About: Credit Report Errors, April 28, 2009, at http://redtape.msnbc.com (Supplemental App. 294-298).

Trying to rectify an erroneous credit report can be an exasperating task. *See* Lazar v. Mauney, 192 F.R.D. 324, 331 (N.D. Ga. 2000), "…publication of the letter has irreparably violated the attorney-client privilege with regards to the letter and that ordering the letter's return is akin to trying to retrieve feathers scattered to the wind from a burst pillow."

If consumers cannot bring an action against a lessor or other violator of sec. 218.0171(2)(cm)3., Wis. Stats., this section is rendered meaningless. Consumers will be vulnerable to a multitude of problems as they will have no means of stopping illegal enforcement of a lease, nor will they have any recourse for damages caused by a violation.

The Lemon Law is a self-enforcing consumer protection statute. Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 981, 542 N.W.2d 148, 151 (1996). Consumers must be able to enforce the rights afforded to them by sec. 218.0171(2)(cm)3., Wis. Stats., so that they are not left at the mercy of lessors and manufacturers.

III. ATTORNEY FEES ARE AWARDABLE UNDER SEC. 218.0171(7), WIS. STATS. AND RECOVERABLE AS DAMAGES FOR A VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

Financial artfully argues that consumers must have a pecuniary loss to bring an action under sec. 218.0171(7), Wis. Stats., without expressly saying so. Financial cites **no authority to support its conclusion** that consumers are only

entitled to recover attorney fees when awarded damages. More importantly, Financial neglects to address the authority relied upon by Kilian supporting the opposite conclusion.

Throughout this action Kilian has maintained that consumers are not required to suffer a pecuniary loss in order to bring an action pursuant to sec. 218.0171(7), Wis. Stats. The decision in Cuellar v. Ford Motor Co., 2006 WI App 210, 296 Wis. 2d 545, 723 N.W.2d 747 (Ct.App. 2006), is directly on point as the Cuellar Court specifically held that a pecuniary loss was not required for consumers to bring an action under a nearly identical statute, sec. 218.0172(4), Wis. Stats. Yet, Financial does not even attempt to distinguish this case and makes no mention of Cuellar.

If Financial is correct that attorney fees cannot be awarded where consumers have no pecuniary loss, it renders the provisions of sec. 218.0171(7), Wis. Stats., **regarding equitable relief superfluous**. Consumers will not be able to bring actions for equitable relief as it will be cost prohibitive to do so.

Additionally, contrary to Financial's assertions, Kilian **does not concede** that his pre-suit attorney fees are not recoverable as damages under sec. 218.0171(7), Wis. Stats. (See pages 21-25 of Petitioner's Brief). Attorney fees incurred as a direct result of a violation of the Lemon Law qualify as damages.

This Court has determined that attorney fees can be awarded as damages in insurance bad faith actions. "Therefore, we conclude that attorney's fees and bond premiums are recoverable by a prevailing party in a first-party bad faith action as

part of those compensatory damages resulting from the insurer's bad faith." DeChant v. Monarch Life Ins. Co., 200 Wis. 2d 559, 577, 547 N.W.2d 592, 599 (1996). The DeChant Court's rationale was that the plaintiff would not have had to seek the assistance of an attorney if the insurer would have timely paid the claims. Since the insurer refused the claims, the plaintiff was forced to retain an attorney and the attorney's fees were damages proximately caused by the insurer's bad faith. Id., 200 Wis. 2d at 571-573, 547 N.W.2d at 596-597.

The same holds true here. But for Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats., Kilian would not have had to re-hire counsel and sue. Financial took affirmative action to collect payments from Kilian after being notified that he returned the vehicle and that its conduct was in violation of sec. 218.0171(2)(cm)3., Wis. Stats. (R. 38: 21, 30-45; R. 39: 2, 8-9). In doing so, Financial breached the duty of good faith that is inherent in the Wisconsin Lemon Law. Herzberg v. Ford Motor Co., 2001 WI App 65, 242 Wis. 2d 316, 325, 626 N.W.2d 67, 72 (Ct.App. 2001). Accordingly, Kilian's attorney fees should be recovered as damages resulting from Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats.

CONCLUSION

Kilian respectfully requests that this Court reverse the lower court decisions and remand this action for a trial on Kilian's claims for defamation damages and attorney fees pursuant to the Wisconsin Lemon Law.

Dated this ___ day of November, 2010.

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CERTIFICATION

I hereby certify that this petition 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 12 pages. It contains 2,995 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(12)(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), Wis. Stats.

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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