

WISCONSIN COURT OF APPEALS
DISTRICT II

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent,

v.

Appeal No. 2009AP000538

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

Defendants-Respondents-Cross-Appellants.

Appeal from the Circuit Court for Waukesha County,
the Honorable Ralph M. Ramirez, Circuit Court Judge,
Presiding
Circuit Court Case No: 2007-CV-1869

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

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STATEMENT OF THE ISSUES

1. Did the trial court fail to make the requisite factual findings to determine whether sanctions against plaintiff-appellant-cross-respondent and/or counsel are appropriate for commencing and continuing to prosecute a frivolous action against defendants-respondents-cross-appellants in violation of WIS. STAT. § 802.05(2)?

2. Do the undisputed facts in the record permit this Court to determine whether plaintiff-appellant-cross-respondent and/or counsel violated WIS. STAT. § 802.05(2)?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because this cross-appeal concerns the application of existing law to a given set of facts which are adequately addressed in the briefs. For the same reasons, the case does not meet the criteria for publication under Rule 809.23.

STATEMENT OF THE CASE

The factual and legal background to this cross-appeal is set forth in the briefs relating to the underlying appeal. On November 21, 2007, Defendants-Respondents-Cross-Appellants, Mercedes-Benz USA, LLC (“MB”) and

Mercedes-Benz Financial (“MBF”), demanded that counsel for Plaintiff-Appellant-Cross-Respondent, Steven T. Kilian (“Kilian”), dismiss all claims against MB and MBF because those claims were not supported by facts or law warranting the relief sought. (R-App. 39-41). At that time, Kilian’s claims included: (1) a claim against MB asserting that it breached the Lemon Law by not refunding the current value of Kilian’s lease to MBF when Kilian returned the leased vehicle to MB and obtained his refund from MB -- a claim addressed by MB and MBF in briefing Kilian’s appeal; (2) a claim against MBF for \$20,847.87 representing the refund Kilian was entitled to receive pursuant to WIS. STAT. § 218.0171(2)(b)3.a. (R-App. 26-30); (3) a claim for damages in the amount of \$95,252.37 representing the current value of the Kilian lease with MBF. (*Id.*). On November 27, 2007, Kilian refused to dismiss those claims. (R-App. 42).

Subsequently, on October 7, 2008, the trial court dismissed Kilian’s claim against MB, holding that MB had no statutory duty to refund anything to MBF. (A-App. 164-174). The Court gave Kilian until November 7, 2008 in which to file an amended itemized list of damages or alleged pecuniary

loss purportedly attributable to MBF's violation of the Lemon Law. (R-App. 169-170, 174). In his November 7, 2008 itemization, Kilian deleted his claim for the \$20,847.87 and the \$95,252.37 previously identified in his December 14, 2007 itemization of damages. (R-App. 31-34). However, Kilian maintained that he was entitled to \$2,500 in attorneys' fees and costs as pecuniary damages -- a claim addressed in briefing Kilian's appeal (MB/MBF Br. pp. 33-37), and \$5,478.36, which was the balance shown on the computer generated account statement sent by MBF to Kilian on July 2, 2007.¹

On December 5, 2008 MB and MBF filed a joint motion to recover attorneys' fees and costs as sanctions under WIS. STAT. § 802.05(3) as a result of Kilian's refusal to dismiss the claims that were the subject of the November 21, 2007 MB/MBF demand to dismiss Kilian's claims, as well as the added claims contained in Kilian's November 7, 2008 itemization. (R-App. 43-49). MB and MBF based their motion on the fact that Kilian had no reasonable basis in law

¹ As noted in briefing Kilian's appeal, Kilian does not pursue this pecuniary loss claim in his appeal. *See* MB/MBF Br. pp. 33, n. 10.

or fact to commence the action against MB in the first place, or to continue the action against MBF upon being notified that the entire balance of Kilian's lease had been paid off by MB in August 2007. (*Id.*). MBF argued that Kilian's November 7, 2008 itemization of damages did not assert a single recoverable pecuniary damage claim that could be supported by fact or law. (*Id.*).

Finally, on January 12, 2009, Kilian attempted to add more substantive claims against MBF for defamation and inconvenience damages, as well as an equitable claim requiring MBF to "clean up" Kilian's credit record. (R-App. 50-70). All of these claims were asserted more than two months after the court imposed deadline for filing claims; each has been addressed in briefing Kilian's appeal. (MB/MBF Br. pp. 37-41).

In a hearing dated January 16, 2009, the trial court dismissed all of Kilian's claims against MBF. (A-App. 203-210, 217-218). With respect to the MB/MBF motion for an award of attorneys' fees and costs as sanctions resulting from Kilian's violation of WIS. STAT. § 802.05(2), the trial court ruled as follows:

There is a request for attorney's fees, and I'm going to deny the request for attorney's fees, and I am not prepared at this time to make a finding that this was a frivolous lawsuit or action, I should say. I think it took us awhile to get at least to November 7th, when a specific claim was clarified, and I found no support as a matter of law, but I think it took us awhile to get there, and I'm not going to find that it's frivolous in that respect.

(A-App. 208-209).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MB/MBF MOTION FOR SANCTIONS WITHOUT MAKING THE REQUISITE FACTUAL DETERMINATIONS TO RESOLVE THE MOTION.

Whether sanctions are appropriate under WIS. STAT. § 802.05(3) for a party's violation of WIS. STAT. § 802.05(2) is committed to the trial court's discretion. In order to properly exercise that discretion, the trial court must examine the relevant facts, apply the proper standard of law to those facts to determine whether sanctions are appropriate, i.e., whether the plaintiff has violated WIS. STAT. § 802.05(2), and reach a conclusion that a reasonable judge could reach. *See Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820; *Sommer v. Carr*, 99 Wis. 2d 789, 792, 798-99, 299 N.W.2d 856 (1981) (trial court is required to make

specific findings of fact to determine whether sanctions are appropriate for filing or continuing a frivolous action).

In the present case, it is undisputed that the trial court made no such findings to resolve the MB/MBF § 802.05(2) motion for sanctions. Instead, the Court simply stated that it was not prepared at the time of the hearing to find that Kilian's suit was frivolous. (A-App. 208-209). Although the absence of findings typically require a remand to the trial court, *see Sommer, supra*, 99 Wis. 2d at 799-800, remand is unnecessary where the underlying facts are undisputed, or there is only one reasonable inference that can be drawn from those facts. *Sommer*, 99 Wis. 2d at 792, n. 1; *see also, Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 227, 517 N.W.2d 658 (1994). MB and MBF submit that the undisputed facts of record permit this Court to determine whether Kilian and/or counsel violated WIS. STAT. § 802.05(2) in commencing and continuing a frivolous action after being given an appropriate opportunity (21 day "safe harbor") to dismiss all claims in November 2007.

II. THE UNDISPUTED FACTS OF RECORD ESTABLISH THAT KILIAN NEVER HAD ANY VIABLE LEMON LAW CLAIM AGAINST MB.

Kilian's claim against MB was premised upon an untenable interpretation of Wisconsin's Lemon Law -- that, as a matter of statutory interpretation, WIS. STAT. § 218.0171(2)(b)3.a., required MB to refund the current value of the lease to MB even if the latter made no offer to transfer title to MB, and even if no refund was sought by MBF. Although Kilian's proffered interpretation of the Lemon Law, WIS. STAT. § 218.0171(2)(b)3.a., has been categorically rejected in *Tammi v. Porsche Cars North America, Inc.*, 2009 WI 83, _____ Wis. 2d _____, _____ N.W.2d _____, Kilian's interpretation of this provision of the Lemon Law, and his claim against MB, never had any merit. For the reasons set forth in briefing Kilian's appeal, (MB/MBF Br. pp. 11-24), Kilian's claim was frivolous throughout the litigation until its dismissal in October 2008. MB respectfully submits that Kilian's Lemon Law claim against MB violated the requirements of WIS. STAT. § 802.05(2)(b), and an award of fees and costs to MB is an appropriate sanction under WIS. STAT. § 802.05(3).

III. THE UNDISPUTED FACTS OF RECORD ESTABLISH THAT AFTER AUGUST 2007, PLAINTIFF NEVER HAD ANY VIABLE CLAIM AGAINST MBF, AND THAT A NUMBER OF CLAIMS ASSERTED BY KILIAN AFTER THE DEADLINE FOR FILING CLAIMS AND IDENTIFYING DAMAGES NOT ONLY VIOLATED THE COURT'S SCHEDULING ORDER, BUT ALSO LACKED EVIDENTIARY SUPPORT.

After the MB/MBF November 21, 2007 written demand that Kilian dismiss its claims against them because Kilian had no reasonable basis in law or fact to continue the action after August 2007, when Kilian's MBF lease was "paid off" by MB, Kilian continued to assert varied and ever changing claims against MBF, each of which was unsupportable under WIS. STAT. § 802.05(2), and thus sanctionable under WIS. STAT. § 802.05(3).

A. Kilian's Claim For \$20,847.87.

The trial court appropriately found in October 2008 that because Kilian had received a \$20,847.87 refund from MB in May 2007, Kilian had no conceivable Lemon Law claim against MBF for this amount, which Kilian continued to prosecute despite MBF's demand that it be dismissed in November 2007. Kilian's continued prosecution of this claim

after November 2007 violated WIS. STAT. § 802.05(2), and warrants sanctions under WIS. STAT. § 802.05(3) in the form of fees and costs to be awarded MBF.

B. Kilian's Claim for \$95,252.37.

The \$95,252.37 sought by Kilian represented the current value of his written lease with MBF. Even before *Tammi*, a consumer-lessee who timely received his refund from a manufacturer had no conceivable claim for the current value of the lease, which is only recoverable by the owner-
lessor after transfer of title to the manufacturer. *See Riley v. Ford Mtr. Co.*, 2001 WI App 234, 248 Wis. 2d 193, 635 N.W.2d 635. Kilian's continued assertion of this claim after MBF's November 21, 2007 demand that it be withdrawn violated WIS. STAT. § 802.05(2), and warrants sanctions under WIS. STAT. § 802.05(3) in the form of fees and costs to be awarded MBF.²

² Kilian did not withdraw this claim until November 7, 2008, almost one year after MBF's demand that it be withdrawn.

C. Kilian's Claim For \$5,478.36.

Kilian continued to seek damages of \$5,478.36 from MBF, representing the balance shown on the computer generated account statement sent by MBF to Kilian on July 2, 2007. Kilian pursued this claim despite the fact that he never paid that amount to anyone, until the trial court dismissed the claim for this very reason. Kilian's continued assertion of this claim against MBF was frivolous under WIS. STAT. § 802.05(2)(a) and (b), and warrants sanctions in the form of fees and costs to be awarded MBF under WIS. STAT. § 802.05(3).

D. Kilian's Claim For Attorneys' Fees As Pecuniary Loss.

For the reasons set forth in the MB/MBF response brief (Br. pp. 33-37), Kilian's claim that attorneys' fees constitute "pecuniary loss" under the Lemon Law finds no support in the law, and Kilian's claim to the contrary violates WIS. STAT. § 802.05(2)(a) and (b). Kilian's maintaining this unsupportable interpretation of the Lemon Law warrants sanctions in the form of fees and costs to be awarded MBF under WIS. STAT. § 802.05(3).

E. Kilian's Belated Claims For Defamation, Inconvenience And Equitable Relief.

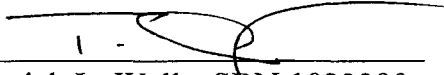
As addressed in the MB/MBF response brief (Br. pp. 37-41), Kilian's defamation and inconvenience damage claims, as well as his "equitable claim," were each interposed long after the court imposed deadline for asserting claims and damages against MBF. Kilian's belated filing of each of these claims warrants the imposition of sanctions because they were interposed long after the trial court's deadline for doing so, *see Hefty, supra*, 2008 WI 96, ¶31. Additionally, with respect to Kilian's defamation claim and his claim for "equitable relief," as MBF demonstrated in its response brief (pp. 38-41), each lacks evidentiary support, which further warrants sanctions under WIS. STAT. § 802.05(2)(c), forbidding allegations lacking such evidentiary support. Consequently, sanctions in the form of fees and costs awarded to MBF is warranted under WIS. STAT. § 802.05(3).

CONCLUSION

For each of the above reasons, MB and MBF respectfully ask the Court to impose appropriate sanctions upon Kilian for improperly filing and continuing his frivolous Lemon Law claims or, alternatively, to remand the issue of whether sanctions are appropriate to the trial court so that it can make appropriate factual findings and determine appropriate sanctions.

Respectfully submitted this 27th day of July, 2009.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this brief is 2,034 words.

Respectfully submitted this 27th day of July, 2009.

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**CERTIFICATE OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:


I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 27th day of July, 2009.

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