Appeal No. 2010AP826 **Cir. Ct. No. 2005CV2885**

WISCONSIN COURT OF APPEALS
DISTRICT II

MARCO A. MARQUEZ,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MERCEDES-BENZ USA, LLC,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Curley, P.J.

Pursuant to WIS. STAT. RULE 809.61 (2009-10)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

What is the proper burden of proof to be applied to an allegation of intentional bad faith on the part of a consumer in a lemon law action under WIS. STAT. § 218.0171, an ordinary burden of proof or a middle burden of proof?

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

Marco Marquez filed a lemon law action under WIS. STAT. § 218.0171 against Mercedes-Benz USA, LLC. The lemon law allows the purchaser of a new car that does not conform to its warranty to receive a refund (or a comparable new vehicle) after reasonable attempts to repair the car have failed. Sec. 218.0171(1)(b)1., (2)(a)-(b). To initiate the refund process, the consumer must offer to transfer the faulty vehicle's title to the manufacturer. Sec. 218.0171(2)(c). The manufacturer then has thirty days to make the refund. ***Id.*** A manufacturer who fails to meet this deadline may be subject to double damages, attorney fees, costs, and equitable relief in a subsequent action. Sec. 218.0171(7). Mercedes-Benz claims that the consumer, Marquez, intentionally thwarted its attempt to make a refund by failing to provide necessary information about the consumer's auto loan. The refund was not issued within the thirty-day time period and, as a result, Marquez claimed he was entitled to statutory remedies under § 218.0171 (2)(c) and (7). A general recitation of the facts submitted on summary judgment are set forth in ***Marquez v. Mercedes-Benz USA, LLC***, 2008 WI App 70, 312 Wis. 2d 210, 751 N.W.2d 859.[2] Relevant to the narrow issue we certify, however, is the following.

In ***Marquez***, we concluded that a consumer has an obligation to act in good faith in the context of a lemon law claim and that "a consumer fails to act in good faith when he or she intentionally prevents the manufacturer from complying with the statute." ***Id.***, ¶¶2-3, 22. If a consumer fails to act in good

[2] While these facts were further developed at the subsequent trial, the facts set forth in ***Marquez v. Mercedes-Benz USA, LLC***, 2008 WI App 70, 312 Wis. 2d 210, 751 N.W.2d 859, provide an overview of the bad faith dispute at issue.

faith, the consumer is not entitled to the lemon law's statutory remedies of double damages and attorney fees. ***Id.***, ¶3. We reversed the circuit court's grant of summary judgment to Marquez based on our conclusion that "the record presents a genuine issue of material fact as to whether the consumer acted in bad faith." ***Id.***

Prior to the jury trial on remand, the parties disputed the appropriate burden of proof to be applied to the allegation that Marquez intentionally failed to act in good faith in dealing with Mercedes-Benz. The trial court applied an ordinary burden; Marquez requested a middle burden. The jury found that Marquez acted in bad faith; however, the trial court subsequently granted Marquez's postverdict motion to change the jury's answer.[3]

DISCUSSION

Wisconsin recognizes two different degrees of persuasion in civil cases. Ordinary civil actions are subject to an ordinary civil standard, which requires the party having the burden of persuasion to prove its contention by the greater weight of the credible evidence to a reasonable certainty. WIS JI—CIVIL 200. Civil cases with penal aspects or involving criminal-type behavior are

[3] The burden of proof issue arises only if the trial court erred in granting Marquez's postverdict motion to change the jury's answer. For purposes of this certification, we assume that there was credible evidence to support the jury's finding of bad faith and, therefore, the trial court's finding to the contrary was erroneous. Regardless of whether Marquez is entitled to statutory double damages and attorney fees under WIS. STAT. § 218.0171, it is undisputed that he is entitled to a refund from Mercedes-Benz.

Also at issue in the event of reversal is whether the trial court erred in excluding the nonprivileged testimony of Marquez's attorney. Mercedes-Benz contends that the attorney possessed relevant information regarding what transpired on the thirtieth day of the refund period.

subject to a middle burden of proof: by evidence that is clear, satisfactory and convincing to a reasonable certainty. WIS JI—CIVIL 205.

The determination of the appropriate burden of proof to be applied to this lemon law claim is a question of statutory interpretation, the principal objective of which is to ascertain and give effect to the intent of the legislature. *See* ***Carlson & Erickson Builders, Inc., v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 658, 529 N.W.2d 905 (1995). While the lemon law statute contemplates both the manufacturer and the consumer acting in good faith, ***Herzberg v. Ford Motor Co.***, 2001 WI App 65, ¶18, 242 Wis. 2d 316, 626 N.W.2d 67, it is silent as to burden of proof and no relevant statutory history exists. The parties therefore look to other indicia of legislative intent.

Mercedes-Benz cites to ***Benkoski v. Flood***, 2001 WI App 84, ¶18, 242 Wis. 2d 652, 626 N.W.2d 851, and ***Carlson***, 190 Wis. 2d at 655-56, as examples of courts rejecting the application of a middle burden of proof when statutory double or treble damage awards are at issue. In ***Carlson***, the supreme court held that an ordinary civil burden of proof applies to a private, civil antitrust claim. ***Carlson***, 190 Wis. 2d at 661-62. The court reasoned that "the lower burden of proof advances the legislature's purpose in enacting the antitrust law," while a middle burden imposes a barrier to a claimant's relief. ***Id.***

Here, as with the antitrust law, the lemon law was enacted to encourage private enforcement. ***Id.*** at 663. "Wisconsin's lemon law was created to be a self-enforcing consumer law that provides 'important rights to motor vehicle owners.'" ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 973, 981-82, 542 N.W.2d 148 (1996) (citing Memorandum from Bronson C. La Follette, Attorney General, to Members of the Legislature, Re: AB 434, Auto "Lemon

Law" Changes, Oct. 14, 1985, Wis. Act 205). The law was intended to encourage consumers to act as private attorneys general in pursuing claims and to provide attorneys with incentives to represent those consumers. In this case, the application of a middle burden of proof would assist the consumer's recovery under the lemon law by imposing a higher burden of proof to the manufacturer's claim that the consumer was not acting in good faith.

However, while the statute advances enforcement by providing financial incentives to private consumers, Mercedes-Benz argues that entirely different public policy considerations are at play when addressing alleged bad faith by the consumer. As we noted in ***Marquez***:

> The statutory penalties of the Lemon Law provide an incentive for manufacturers to promptly comply with the refund and exchange rules by making it costly to delay. This purpose is not served if the consumer may, in essence, inflict the penalties on the manufacturer even if the manufacturer is attempting to comply with the law within the proper time limit.

Marquez, 312 Wis. 2d 210, ¶21 (citation omitted). Indeed, Mercedes-Benz contends that it would be absurd to conclude that the legislature intended to encourage a consumer's noncooperation by setting a higher bar for the burden of proof. Marquez counters that a lower burden of proof would not comport with the overall statutory purpose and would provide incentive for mischief on the part of the manufacturer.

While the good faith requirements in the lemon law do not stem from common law but from the lemon law itself, *see* ***Kiss v. General Motors Corp.***, 2001 WI App 122, ¶30, 246 Wis. 2d 364, 630 N.W.2d 742, both parties look to common law for guidance as to legislative intent. Both parties cite to case law applying either the ordinary or middle burden of proof in cases that they

analogize to this lemon law case. Marquez first contends that Mercedes-Benz's allegation of bad faith should be treated in the same manner as a bad faith insurance tort claim. Citing to ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 569, 547 N.W.2d 592 (1996), and ***Johnson v. American Family Mut. Ins. Co.***, 93 Wis. 2d 633, 645, 287 N.W.2d 729 (1980), Marquez argues that bad faith is an intentional breach of a duty and must be proven by clear and convincing evidence. However, a bad faith allegation in an insurance dispute arises from a special fiduciary relationship an insurer owes its insured. ***DeChant***, 200 Wis. 2d at 570.

Marquez next contends that the allegation involves wrongful conduct. He points to cases requiring a middle burden of proof which include fraud, undue influence, and prosecutions of civil ordinance violations which are also crimes under state law. *See* ***State v. Walberg***, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982). In such cases "a greater degree of certitude is required before there is a finding against a defendant who will be subjected to the stigma attached to the commission of certain classes of acts." ***Layton Sch. of Art and Design v. WERC***, 82 Wis. 2d 324, 262 N.W.2d 218 (1978).

Marquez cites to numerous civil cases in which a middle burden of proof was applied. However, consistent with the court's observation in ***Walberg***, many of these cases involved conduct that could also be crimes under state law. *See* ***Layton***, 82 Wis. 2d at 336, 342, 362-63 (defendant accused of unfair labor practices, based partially on a finding of perjury, was not entitled to criminal burden of proof when the proceeding is not criminal and legislature expressly requires a middle burden of proof); ***Ziegler v. Hustisford Farmers Mut. Ins. Co.***, 238 Wis. 238, 298 N.W. 610 (1941) (middle burden applies when an insurer denying coverage on grounds of arson; need not prove beyond a reasonable

doubt); ***Macherey v. Home Ins. Co.***, 184 Wis. 2d 1, 16-17, 516 N.W.2d 434 (Ct. App. 1994) (insured entitled to middle burden of proof when insurer denied coverage based on allegation of intentional bodily injury, noting that insured could be "subjected to the stigma attached to a person who intentionally runs over an individual with an automobile"); ***State v. Fonk's Mobile Home Park and Sales, Inc.***, 133 Wis. 2d 287, 301, 395 N.W.2d 786 (Ct. App. 1986) (alleged administrative code violations subjected the defendant to criminal penalties).

Acknowledging that the alleged conduct at issue here is not criminal, Marquez nevertheless argues that the stigma associated with the allegations against him are "harmful to [his] character and reputation as well as that of his counsel." He likens the bad faith allegation in this case to one of common law fraud which requires a middle burden of proof. *See* ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 905, 419 N.W.2d 241 (1988) ("It is well established that a common law claim sounding in fraud must be established by the middle burden of proof."); *compare* ***Kain v. Bluemound E. Indus. Park, Inc.***, 2001 WI App 230, ¶42, 248 Wis. 2d 172, 635 N.W.2d 640 (ordinary burden applies to claim of negligent misrepresentation). Marquez also cites to actions in which, as in common law fraud cases, the middle burden applies, presumably because a stigma is associated with the action. *See* ***Kuehn v. Kuehn***, 11 Wis. 2d 15, 20-21, 104 N.W.2d 138 (1960) (middle burden of proof applies to undue influence claim), WIS JI—CIVIL 2520 and WIS JI—CIVIL 1707.1 (middle burden applies to punitive damages in defamation and nonproducts liability actions); WIS JI—CIVIL 2780 (middle burden applies to allegations of intentional interference with contractual relationship); WIS JI—CIVIL 2401 cmt. (middle burden applies to claim of misrepresentation by intentional deceit).

Mercedes-Benz argues that this is an "ordinary civil action" and likens its claim to that of breach of the duty of good faith and fair dealing. Mercedes-Benz contends that neither bad faith analysis necessarily involves an element of malicious intent or improper motive. Mercedes-Benz cites to the RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981), "Duty of Good Faith and Fair Dealing," which includes interference with or failure to cooperate in the other party's performance as one type of bad faith:

> *Good faith performance*. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his [or her] conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and *interference with or failure to cooperate in the other party's performance*. (Emphasis added.)

See also ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 797, 541 N.W.2d 203 (Ct. App. 1995) (citing with approval RESTATEMENT (SECOND) CONTRACTS § 205 cmt. d). Marquez counters that ***Marquez*** requires intentional bad faith which carries greater stigma than bad faith as defined in the context of good faith and fair dealing in contract law. *See* ***Northern Crossarm, Inc. v. Chemical Specialties, Inc.***, 332 F. Supp. 2d 1181, 1188 (W.D. Wis. 2004) ("Wisconsin law does not limit breaches of the duty of good faith to intentional acts taken in bad faith. It construes the duty as applying to constructive bad faith and including such acts as failure to act, carelessness, neglect and actions that frustrate the purpose of the agreement.").

The parties agree that the obligation to act in good faith arises not under common law, but under the lemon law. Thus the purpose and policies under the lemon law are paramount to the statutory interpretation in this case. As there is no law governing the burden of proof to be applied when an allegation of intentional bad faith arises, we request the guidance of the supreme court.

Here, Mercedes-Benz alleges that Marquez intentionally prevented it from complying with the lemon law statute by failing to cooperate; Marquez argues that the manufacturer failed to attempt the refund until the last possible day and then neglected to obtain the necessary payoff information from obvious sources. We concluded in ***Marquez*** that, among other things, "the differing recollections of the conversations between Marquez and the [Mercedes-Benz] representative creat[ed] an issue of fact about what was requested of, and agreed to, by Marquez." On remand, the jury found that Marquez "fail[ed] to act in good faith in his dealings with Mercedes-Benz." The trial court, however, disagreed. Given the disputed facts at issue, the applicable burden of proof could be dispositive. We therefore respectfully request the supreme court's guidance as to the appropriate burden of proof given the need to balance the policies underlying the lemon law with the obligation of the consumer to act in good faith in dealing with the manufacturer.