**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 24, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2009AP538** **Cir. Ct. No. 2007CV1869**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STEVEN T. KILIAN,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**MERCEDES-BENZ USA, LLC AND DAIMLER CHRYSLER FINANCIAL SERVICES AMERICAS, LLC D/B/A MERCEDES-BENZ FINANCIAL,**

**DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.**

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APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Steven Kilian returned a leased vehicle to Mercedes-Benz-USA, LLC under Wisconsin's Lemon Law, WIS. STAT.

§ 218.0171 (2007-08).[1] He appeals from an order and judgment dismissing his claims against Mercedes-Benz, and the lessor, Mercedes-Benz Financial (hereafter Financial), for alleged violations of the Lemon Law after Financial notified Kilian that he was delinquent on lease payments. Mercedes-Benz and Financial cross-appeal seeking reversal of the circuit court's determination that the lawsuit is not frivolous. We affirm the judgment and the denial of costs and attorneys fees for a frivolous action.

¶2 In March 2006 Kilian leased a Mercedes-Benz vehicle under a thirty-nine month lease assigned to Financial. On May 20, 2007, in accordance with an agreement with Mercedes-Benz under Wisconsin's Lemon Law, Kilian returned the vehicle to the dealer and received a refund check from Mercedes-Benz. Kilian then received phone calls from Financial indicating that he was in default on the lease payments. He also received a payment notice in the mail and a "Federal Legal Notice" dated July 1, 2007, indicating that Financial would report negative information about the lease account to credit bureaus. In response, Kilian explained that the vehicle had been returned and the lease should be considered terminated. When his efforts to resolve the matter failed, Kilian filed this action on July 10, 2007. On August 29, 2007, Mercedes-Benz paid off the lease by a $95,252.37 payment to Financial.

¶3 Summary judgment was granted. We review summary judgment decisions de novo, applying the well established methodology. ***Kiss v. General Motors Corporation***, 2001 WI App 122, ¶9, 246 Wis. 2d 364, 630 N.W.2d 742.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶4 Kilian claims that Mercedes-Benz, the manufacturer, violated WIS. STAT. § 218.0171(2)(b)3.a., by not automatically refunding to Financial the current value of the lease within thirty days of Kilian's demand for a refund. Mercedes-Benz maintains that its obligation to payoff the lease is only triggered when the lessor, Financial, offers to transfer title of the vehicle to it under § 218.0171(2)(cm)2.

¶5 The Lemon Law first describes a manufacturer's obligation after reasonable attempts to repair nonconformity fails and the vehicle is considered a "lemon." To that end, for a leased vehicle, WIS. STAT. § 218.0171(2)(b)3.a., requires the manufacturer to:

> accept return of the motor vehicle, refund to the motor vehicle lessor and to any holder of a perfected security interest in the motor vehicle, as their interest may appear, the current value of the written lease and refund to the consumer the amount the consumer paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use.

¶6 The Lemon Law then lays out how the consumer seeks the desired remedy. *See* ***Varda v. General Motors Corporation***, 2001 WI App 89, ¶28, 242 Wis. 2d 756, 626 N.W.2d 346 (provisions following subsection (2)(b) provides further specificity regarding how a consumer obtains a refund). A purchaser of a lemon offers to transfer title to vehicle to the manufacturer and when the manufacturer provides a new motor vehicle or refund, the consumer returns the lemon with the necessary endorsements on the title for the transfer of title. WIS. STAT. § 218.0171(2)(c). A different procedure applies to a consumer who leases a vehicle because the consumer does not have title to the vehicle. *See* ***Tammi v.***

***Porsche Cars North America, Inc.***, 2009 WI 83, ¶40, 320 Wis. 2d 45, 768 N.W.2d 783 (provisions for explicit protection of lessees are obviously separate from the provisions protecting purchasers). Under § 218.0171(2)(cm)1., a consumer lessee receives a refund by offering to return the lemon to the manufacturer and when the refund is provided, the consumer returns the vehicle to the manufacturer. Section 218.0171(2)(cm)1., provides:

> To receive a refund due under par. (b) 3., a consumer described under sub. (1) (b) 4. shall offer to the manufacturer of the motor vehicle having the nonconformity to return that motor vehicle to that manufacturer. No later than 30 days after that offer, the manufacturer shall provide *the refund to the consumer*. When the manufacturer provides the refund, the consumer shall return the motor vehicle having the nonconformity to the manufacturer.

(Emphasis added.)

¶7 Although WIS. STAT. § 218.0171(2)(b)3.a., requires the manufacturer to refund to the motor vehicle lessor the current value of the written lease, § 218.0171(2)(cm)1., does not address how that refund is made. Section 218.0171(2)(cm)2. does, and provides:

> To receive a refund due under par. (b) 3., a motor vehicle lessor shall offer to the manufacturer of the motor vehicle having the nonconformity to transfer title of that motor vehicle to that manufacturer. *No later than 30 days after that offer, the manufacturer shall provide the refund to the motor vehicle lessor.* When the manufacturer provides the refund, the motor vehicle lessor shall provide to the manufacturer the certificate of title and all endorsements necessary to transfer title to the manufacturer.

(Emphasis added.)

In providing an overview of the Lemon Law, our supreme court recognized that § 218.0171(2)(cm), places obligations to the manufacturer on both the consumer

and the lessor that must be satisfied to receive a refund. ***Tammi***, 320 Wis. 2d 45, ¶44. The lessor, as holder of the title, must offer to transfer title in order to receive its refund. ***Id.*** The statute is unambiguous in this provision and we need not consider, as Kilian urges, whether requiring separate offers is good public policy.[2] In the absence of an offer, the manufacturer has no obligation to refund the current value of the lease to the lessor.

¶8 It is undisputed here that Mercedes-Benz did not receive an offer from Financial to transfer title until sometime after this suit was commenced. Mercedes-Benz did not violate the Lemon Law. The claim against it is properly dismissed.

¶9 Kilian's claim against Financial is based on WIS. STAT. § 218.0171(2)(cm)3., which provides that "no person may enforce the lease against the consumer after the consumer receives a refund." 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.[3] A consumer may recover any damages caused by a violation of the Lemon Law and a prevailing consumer shall be awarded twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees. Section 218.0171(7). The circuit court determined that Kilian did not suffer a pecuniary loss and dismissed the complaint against Financial.

[2] The consumer is protected because WIS. STAT. § 218.0171(2)(cm)3., declares that the lease is unenforceable once the consumer receives a refund.

[3] Financial also assumes, *arguendo*, that a violation occurred.

¶10 What pecuniary loss did Kilian suffer? In his first itemization of damages, Kilian indicated that his damages were his payments under the lease (less a reasonable use allowance) in the amount of $20,847.87, and the value of the written lease in the amount of $95,252.37; he doubled both figures and also claimed accruing actual attorney fees, costs, and prejudgment interest. When the circuit court determined that Kilian was not allowed to recover those amounts, Kilian filed a second itemization of damages which indicated he was entitled to recover $5,478.36 representing the amount Financial demanded as payment under the lease, his attorney fees incurred before filing the lawsuit in the amount of $2,434.25, and the filing fee and service fees, sums which he doubled. In opposition to Financial's motion to strike Kilian's damages, he claimed he was entitled to seek "general damages" caused by Financial's negative reporting to credit bureaus, inconvenience damages, and equitable relief. On appeal Kilian argues that his pre-suit attorney fees and costs, defamation general damages, and inconvenience damages are his pecuniary loss.[4]

¶11 Wisconsin follows the American Rule with respect to attorney fees meaning that "with the exception of those attorneys' fees incurred in third-party litigation caused by the party from whom fees are sought, attorneys' fees may not be awarded unless authorized by statute or by a contract between the parties." ***Community Care Organization v. Evelyn O.***, 214 Wis. 2d 434, 437, 571 N.W.2d 700 (Ct. App. 1997). Thus, litigants are not entitled to collect attorney fees from

[4] Obviously Kilian is not entitled to recover the amount demanded as lease payment because he did not pay that amount. He is not entitled to recover his payments under the lease because that amount was refunded by Mercedes-Benz. He is not entitled to recover the value of the lease because "[t]he consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out that amount of money." ***Estate of Riley v. Ford Motor Co.***, 2001 WI App 234, ¶12, 248 Wis. 2d 193, 635 N.W.2d 635.

the opposing party as pecuniary damages. 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. The attorney fees Kilian claims do not result from third-party litigation. Kilian is not entitled to recover pre-suit attorney fees or costs as pecuniary damages.

¶12 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. Kilian did not make any connection between that mistaken reporting and his credit rating or financial reputation. Kilian argues that he was not required to prove any special damages for defamation and that there is a conclusive presumption of the existence of such damages. *See* ***Martin v. Outboard Marine Corp.***, 15 Wis. 2d 452, 459, 113 N.W.2d 135 (1962). That may be in some actions for libel or slander. But Kilian's complaint only states a cause of action under the Lemon Law and WIS. STAT. § 218.0171(7), requires a causal link between the act alleged to be a violation of the Lemon Law and damages. *See* ***Gosse v. Navistar International Transp. Corp.***, 2000 WI App 8, ¶14, 232 Wis. 2d 163, 605 N.W.2d 896 (the Lemon Law does not allow a consumer to recover personal injury damages for a Lemon Law violation and the consumer is not precluded from asserting a second claim under another law for those damages). Kilian failed to establish that link.

¶13 Kilian's claim for inconvenience damages is too vague to be a cognizable element of damages. Kilian cites ***Piorkowski v. Liberty Mut. Ins. Co.***, 68 Wis. 2d 455, 463, 228 N.W.2d 695 (1975), and ***White v. Benkowski***, 37 Wis. 2d 285, 289, 155 N.W.2d 74 (1967), as approving inconvenience damages. In ***Piorkowski*** damage to a family's well cut off of the water supply to the household for approximately six months and caused actual physical inconvenience of having to go without water or go elsewhere to secure water for personal use and hygiene. ***Id.***, 68 Wis. 2d at 463. In ***White*** the water supply to a home was periodically shut-off in breach of a contract between the parties and the plaintiff was forced on two occasions to take her children to a neighbor's home to bathe them. ***Id.***, 37 Wis. 2d at 288. Financial's phone calls and overdue notices are not the same character of the acts in ***Piorkowski*** and ***White*** which supported inconvenience damages. In each of those cases the wrongful conduct physically displaced the daily activities of the plaintiffs. Kilian offered no such proof here. Further, ***Piorkowski*** confirms that a claim of emotional strain or humiliation not manifested by or causative of any physical injury is not compensable. ***Id.***, 68 Wis. 2d at 464-65. The claim of inconvenience did not preclude summary judgment.

¶14 Finally, Kilian argues that his complaint survives dismissal because he seeks equitable relief. He claims he is entitled to a judgment enjoining Financial from further publication of defamatory matter and compelling Financial to wipe his credit history clean by reversing the reporting to credit bureaus. The first step in summary judgment methodology requires us to examine the pleadings to determine whether a claim for relief has been stated. ***Crowbridge v. Village of Egg Harbor***, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). Kilian's complaint did not seek any type of injunctive relief. "To obtain an injunction, a

plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff." ***Pure Milk Products Coop. v. National Farmers Organization***, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Kilian made no such showing in this summary judgment record. Kilian's failure to make a connection between the probable reporting to credit bureaus and an actual negative effect on his credit rating forecloses an obligation of Financial to rectify the reporting. There is no basis for equitable relief and the complaint against Financial is properly dismissed.

¶15 The cross-appeal seeks review of the circuit court's conclusion that Kilian's action was not frivolous. Mercedes-Benz and Financial moved for an award of attorney fees and costs under WIS. STAT. § 802.05(3), on the ground that Kilian had no reasonable basis in law or fact to commence the action or to continue the action once the lease was paid off. *See* § 802.05(2)(b) (the filing of any pleading certifies that to "the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," "[t]he claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."). Without citation to authority Mercedes-Benz and Financial argue that whether sanctions are appropriate under § 802.05(3), is committed to the circuit court's discretion and that the circuit court's cursory ruling fails to demonstrate an exercise of discretion.

¶16 Traditionally we owe deference to the circuit court's determination that an action was or was not commenced frivolously.[5] ***Storms v. Action Wisconsin, Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. The inquiry into whether a claim is without basis in law or fact or taken for an improper purpose involves a mixed question of fact and law. *See* ***Brunson v. Ward***, 2001 WI 89, ¶27, 245 Wis. 2d 163, 629 N.W.2d 140 (addressing the prior frivolous claim statute, WIS. STAT. § 814.025 (2003-04)). "[T]he nature and extent of investigation undertaken prior to filing a suit are issues of fact, and a circuit court's determinations on such questions will be upheld unless clearly erroneous" and the determination of how much investigation was needed is a question that is within the circuit court's discretion. ***Storms***, 309 Wis. 2d 704, ¶34. With respect to whether an action was maintained frivolously, what an individual or attorney knew or should have known is a question of fact. ***Id.***, ¶35. However, whether those underpinnings support a finding of no basis in law or fact, presents a question of law which we review independently of the circuit court. ***Id.***, ***Brunson***, 245 Wis. 2d 163, ¶27. "[W]hether a legal theory is justified by existing law or a good faith argument for a change in the law presents a question of law, and our review on this issue is therefore de novo." ***Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Bd.***, 2004 WI App 30, ¶16, 269 Wis. 2d 837, 676 N.W.2d 580. We also adhere to the guidepost that all doubts

[5] Before the 2005 repeal of WIS. STAT. §§ 802.05 and 814.025 (2003-04) and recreation WIS. STAT. § 802.05, two different standards of review were applied to circuit court determinations regarding frivolousness, one regarding commencing frivolous actions and one regarding continuing frivolous actions. ***Storms v. Action Wisconsin, Inc.***, 2008 WI 56, ¶33, 309 Wis. 2d 704, 750 N.W.2d 739. In ***Storms***, the court recognized that the new § 802.05 "may call into question the existence of different standards of review for commencing and continuing frivolous claims." ***Id.***, ¶35 n.7. Although the ***Storms*** court indicated that under the federal rule on which § 802.05 is patterned, federal courts review the imposition of sanctions for erroneous exercise of discretion, ***id.***, ¶35 n.7, it did not decide the applicable standard of review.

about whether a claim is frivolous are resolved in favor of finding the claim nonfrivolous. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994).

¶17 We conclude that Kilian's claim against Mercedes-Benz that it had an obligation to refund the current value of the lease to the lessor was not without a basis in law or fact. Indeed WIS. STAT. § 218.0171(2)(b)3.a., places that obligation on the manufacturer when the proper request is made. Kilian made a nonfrivolous argument that the payoff should occur automatically. At the time the action was filed, Financial still had not made a request for a refund and was attempting to collect on the lease. Commencement of the action was not frivolous when action was required by both Mercedes-Benz and Financial to clarify that the lease was not enforceable against Kilian.

¶18 Once the lease was paid off, Kilian's continuation of the action was not frivolous. It appeared that Financial had violated the Lemon Law by trying to enforce the lease. Legitimate questions existed about whether Kilian actually suffered damages as a result. The circuit court gave Kilian additional time to define his damages and thus suggested viability of his claim. Although ultimately his asserted damages are not recoverable, it does not render the continuation of the action frivolous.

¶19 No costs to any party.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.