COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2361

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

MICHAEL J. MORGAN,

PLAINTIFF-APPELLANT,

V.

FORD MOTOR COMPANY, A FOREIGN CORPORATION, AND BEST MOTORS, INC., A FOREIGN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. In this appeal from a judgment dismissing his "Lemon Law" claim against Ford Motor Company and Best Motors, Inc., Michael J. Morgan challenges a jury instruction and an allegedly inconsistent verdict. We conclude that the circuit court did not misuse its discretion in

instructing the jury, and Morgan waived any complaint about the verdict because he acquiesced in the verdict at trial.

¶2 Morgan purchased a new 1994 Ford Bronco from Best Motors, an authorized Ford dealer. He experienced problems with the vehicle during his first year of ownership, including problems with the brakes. Morgan contended that the brake nonconformity was never repaired, despite numerous service visits, that the vehicle was out of service for at least thirty days due to the brake problems and that there were more than four unsuccessful attempts to remedy the nonconformity. Morgan sued Ford and Best under Wisconsin's so-called Lemon Law, § 218.015, STATS.

¶3 After a three-day jury trial, the jury returned a verdict in favor of Ford and Best. On appeal, Morgan contends that the circuit court erroneously instructed the jury regarding the definition of the statutory term "nonconformity."

¶4 A consumer's remedies under Wisconsin's Lemon Law apply if a new vehicle does not conform to an applicable express warranty, the consumer reports the nonconformity and makes the vehicle available for repair, and the vehicle has not been repaired despite a reasonable attempt to repair as defined in § 218.015(1)(h), STATS.[1] *See* § 218.015(2). Under § 218.015(1)(f), a

[1] Section 218.015(1)(h), STATS., provides:

> "Reasonable attempt to repair" means any of the following occurring within the term of an express warranty applicable to a new motor vehicle or within one year after first delivery of the motor vehicle to a consumer, whichever is sooner:
>
> 1. The same nonconformity with the warranty is subject to repair by the manufacturer, motor vehicle lessor or any of the manufacturer's authorized motor vehicle dealers at least 4 times and the nonconformity continues.

(continued)

"nonconformity" is defined as "a condition or defect which substantially impairs the use, value or safety of a motor vehicle, and is covered by an express warranty applicable to the motor vehicle or to a component of the motor vehicle, but does not include a condition or defect which is the result of abuse, neglect or unauthorized modification or alteration of the motor vehicle by a consumer."

¶5 The first issue on appeal concerns the court's definition of nonconformity in the jury instruction. Morgan objected to the italicized portion of the court's proposed instruction:

> "Substantially impairs" in this context refers to a condition or defect that significantly, or *seriously* impairs the use, value or safety of a vehicle. The condition or defect must be more than an annoyance or minor inconvenience. However, the plaintiff's vehicle need not have been undrivable for the condition or defect to be substantial. Also, the defect or condition may be substantial even if the vehicle was able to provide simple transportation.

¶6 Morgan objected to the court's elaboration on the statutory phrase "substantially impairs" to include "seriously" because "seriously" is not synonymous with "substantially" and suggests a higher level of proof to meet the nonconformity element of the claim.

¶7 After consulting a dictionary and a thesaurus, the circuit court concluded that the jury would not be misled by an instruction which equated "substantially" with "seriously." The court did not agree that the jury would

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2. The motor vehicle is out of service for an aggregate of at least 30 days because of warranty nonconformities.

require a higher level of proof if the instruction included "seriously." Morgan renews his arguments on appeal. We are unpersuaded.[2]

¶8 A circuit court's discretion in preparing jury instructions "extends to both choice of language and emphasis." *See* ***County of Kenosha v. C & S Management, Inc.***, 223 Wis.2d 373, 395, 588 N.W.2d 236, 247 (1999) (quoted source omitted). Although the court has broad discretion, whether it correctly instructed the jury presents a question of law which we determine independently. *See* ***id.***

¶9 We conclude that the circuit court properly exercised its discretion when it decided to equate "substantially" with "seriously." The court stated its reasons for doing so, including the basis for its belief that the two words are synonymous. We agree that defining "substantially" in terms of "significantly" or "seriously" did not mislead the jury or suggest that Morgan had a higher level of proof. Reading the entire jury instruction in context, not isolated portions of it, *see* ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 82, 443 N.W.2d 50, 64 (Ct. App. 1989), we conclude that it is not probable that including "seriously" in the nonconformity definition misled the jury. *See* ***id.***

¶10 We turn to Morgan's claim that the verdict was inconsistent. Although not argued by Ford, we conclude that this claim is waived because Morgan acquiesced in the verdict after it was returned. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978)

[2] Ford argues that Morgan's jury instruction argument is moot because he received a favorable verdict from the jury on the existence of a nonconformity. While we agree with Ford, we nevertheless exercise our discretion to decide the issue on the merits. *See* ***State v. Trent N.***, 212 Wis.2d 728, 735-36, 569 N.W.2d 719, 723 (Ct. App. 1997).

(appellate court is not required to address an argument in the manner in which a party has structured the issue).

¶11 The reading of the verdict made clear that some jurors had dissented from the majority's response to certain verdict questions. The court excused the jury to permit the parties to discuss the verdict. On the question of whether Morgan's vehicle had a nonconformity covered by the manufacturer's express warranty, ten jurors answered "yes" and two jurors (Eckart and Knutson) answered "no."[3] On the question of whether Morgan provided Ford with at least four attempts to repair the same nonconformity within the terms of the warranty and whether the nonconformity continued, ten jurors said "no" and two different jurors said "yes" (Feder and Borchers). All twelve jurors agreed that Morgan's vehicle was not out of service for an aggregate of thirty days due to the nonconformity and that Ford did not fail to repair the nonconformity before the warranty expired.

¶12 Ford's counsel offered a way of reconciling the verdicts. Counsel argued that two of the twelve jurors did not find a nonconformity. In order to be consistent, the two jurors who did not find a nonconformity also found that there had not been four attempts to repair the nonexistent nonconformity. The two jurors who found that Morgan provided Ford with four attempts to repair the nonconformity were "lone wolves" who thought there was a nonconformity and there were four attempts to repair it. The court and Morgan's counsel agreed that Ford's counsel had offered a reasonable reconciliation of the verdict answers.

[3] We note that the copy of the special verdict form in the appendix to Morgan's appellant's brief does not match the special verdict form in the record on appeal. The appendix must contain portions of the record. *See* RULE 809.19(2), STATS. It appears that the special verdict form included in the appendix does not appear in the record on appeal. Counsel is cautioned to comply with this rule in the future.

¶13 On appeal, Morgan argues that it is possible to interpret the answers to the special verdict questions in a manner which renders them inconsistent. However, this argument was waived by Morgan's acquiescence in the verdict at the time it was delivered. Judicial estoppel prohibits a litigant from asserting a position that is contrary to, or inconsistent with, a position previously asserted by that litigant. *See* ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991). Therefore, we do not address Morgan's appellate argument regarding the verdict.

By the Court.—Judgment affirmed.

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