08AP1913

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO.: 2008AP001913-CQ

BRUCE A. TAMMI,

Plaintiff-Appellee,

vs.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant-Appellant.

CERTIFIED QUESTIONS FROM SEVENTH CIRCUIT COURT OF APPEALS, APPEAL NO. 07-1832

DEFENDANT-APPELLANT'S BRIEF ADDRESSING THE SEVENTH CIRCUIT'S CERTIFIED QUESTIONS AND APPENDIX

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant,
PORSCHE CARS NORTH AMERICA, INC.
Jeffrey S. Fertl
State Bar No. 1014806

P.O. ADDRESS:

Hinshaw & Culbertson LLP
100 E. Wisconsin Ave., #2600
Milwaukee, WI 53202-4115
414-276-6464

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Wisconsin Cases

Other Jurisdictions

Statutes

Miscellaneous

ISSUES PRESENTED FOR REVIEW

The following four issues have been certified by the United States Court of Appeals for the Seventh Circuit:

1. When a consumer defined in Wisconsin Statute § 218.0171(1)(b)4 brings an action pursuant to subsection (7), if that consumer, after making his Lemon Law demand, then exercises an option to purchase and buys the vehicle as provided in the lease, is the consumer then entitled to recover the amount of the purchase price?

Answered by the Federal District Court: Yes.

2. If the consumer defined in Wisconsin Statute § 218.0171(1)(b)4 is entitled to recover the vehicle purchase price when he exercises the purchase option provided in the lease, does the purchase amount qualify as pecuniary loss subject to the doubling provision in subsection (7)?

Answered by the Federal District Court: Yes.

3. If the answers to questions 1 and 2 are in the affirmative, is the consumer permitted to keep the purchased vehicle in addition to the receipt of the damage award or must the vehicle be returned to the manufacturer?

Answered by the Federal District Court: The consumer is permitted to keep the vehicle.

4. Is a damage award under subsection (7) subject to a reduction for reasonable use of the vehicle?

Answered by the Federal District Court: No.

STATEMENT ON ORAL ARGUMENT

As stated by the Seventh Circuit Court of Appeals, resolution of the certified issues presented by this case will clarify application of the Lemon Law and establish significant legal precedent. As a result, Defendant-Appellant, Porsche Cars North America, Inc. (hereinafter "Porsche") submits that oral argument would be of assistance to the court in addressing these certified issues.

STATEMENT OF THE CASE

Plaintiff-Appellee, Bruce A. Tammi (hereinafter "Tammi") leased the subject 2003 Porsche Turbo and took delivery of it on May 30, 2003. (Dkt. #84, p. 82). Tammi entered into a lease with U.S. Bank for the subject vehicle. (Dkt. #51, Exh. 1). The lease gave him the option to purchase the vehicle at the conclusion of the lease or return it to the lessor. (Dkt. #85, p. 235).

According to the service orders and warranty history, Tammi drove the vehicle until March 2, 2004 before seeking any service. (Dkt. #51, Exh. 8). During that approximate nine month period of time, he put 6,576 miles on the

vehicle for an average of 731 miles per month. (Dkt. #51, Exh. 8).

Tammi's primary basis for his lemon law claim related to an intermittent failure of the rear spoiler to automatically retract. Mr. Tammi testified that after successfully operating the vehicle for the first eight months, he began experiencing an intermittent rear spoiler failure, which Tammi claimed resulted in an irritating and distracting warning chime. (Dkt. #84, p.83). Tammi contended that the problem persisted until at least November 5, 2004, an eight month interval. At that point the vehicle had 13,023 miles. (Id. at pp. 222-223). Tammi served a Lemon Law notice upon the defendant on September 7, 2004. (Dkt. #9, Exh. 13). The Lemon Law notice sought a refund of the lease payments plus collateral costs. It also offered to return the vehicle upon receipt of the demanded relief.

After serving the lemon law notice, and while this lawsuit was pending, Tammi decided to voluntarily purchase the vehicle from the lessor, U.S. Bank, in December of 2005. In order to purchase the vehicle, he entered into a purchase contract with U.S. Bank for the vehicle. (Id. at 237). As lessor, U.S. Bank held the title for the vehicle. In purchasing the vehicle, Tammi paid U.S. Bank the same

amount established by the lessor when the lease was originally executed. (Id. at 241). Tammi testified that he decided to purchase the vehicle in December of 2005 because he felt it was worth more than the lease buy-out amount. (Id. at 239). Before purchasing the vehicle, he never advised U.S. Bank that the vehicle he was purchasing was the subject of a lemon law claim under the Wisconsin lemon law. (Id. at 237).

Tammi commenced this action against Porsche under the Wisconsin Lemon Law on October 14, 2004. (Dkt. #1, Exh. A., 1). Porsche removed the action to federal district court on November 1, 2004. (Dkt. #1). The allegations in the Complaint against Porsche were based solely on the Wisconsin Lemon Law. (Dkt. #1, Exh. A). The ad damnum clause of the Complaint sought double damages for plaintiff's lease payments ($138,654.20), plus double the costs for maintaining and insuring the vehicle. (Dkt. #1, Exh. A., p. 3).

On December 6, 2004, shortly after the lawsuit was filed, Tammi filed a motion for summary judgment. In that motion for summary judgment Tammi sought damages for twice his lease payments but agreed to waive any other damages for purposes of the motion. (Dkt. #7 and #8). The district court denied the motion for summary judgment,

finding that material factual issues existed regarding whether there was a substantial impairment of the safety of the vehicle. (Dkt. #25).

Under the Local District Court Rules, Tammi filed his Rule 26(f) disclosures on January 14, 2005. (Dkt. #51, Exh. 54). Tammi alleged the following damages in his initial Rule 26(f) disclosures:

C. Damages Claimed:

1)	U.S. Bank (Porsche lease amount)	$69,327.10
2)	The Tire Rack (Winter tire/wheel package for Porsche)	$ 2,044.11
3)	International Autos (Floor mats and work shop manual for Porsche)	$ 788.71
4)	State Farm Insurance (Insurance on Porsche paid to date)	$ 1,650.37

(Id.)

Under the court's scheduling order, discovery was to be completed by September 1, 2005. (Dkt. #22). A scheduling conference was held on April 12, 2006 wherein the court referred the matter to mediation and set a final pretrial conference on August 3, 2006. (Dkt. #27).

On June 13, 2006 Porsche was notified that Tammi was seeking additional damages. Such disclosure was made by a supplemental Rule 26(f) disclosure after the completion of

discovery. (Dkt. #35, Exh. A). The damages claimed in the supplemental disclosure were as follows:

Insurance Premiums	$ 2,564.07
Lease Payments (5/30/03-11/30/05)	$ 59,370.35
Lease Buy-Out Payment (12/27/05)	$ 75,621.88
Tire rack (winter tire/wheel package)	$ 2,044.71
Floor mat/workshop manuals	$ 788.71
TOTAL:	$140,389.12

(Id.) Porsche subsequently filed motions in limine regarding Tammi's claimed damages for collateral costs and his voluntary purchase of the vehicle before the lease concluded. (Dkt. #33 and #34). The district court denied the motions. (Dkt. #41).

The case proceeded to trial on August 22-24, 2006. Before the case was submitted to the jury, there was considerable discussion between the district court and counsel as to the proper measure of damages under the Wisconsin Lemon Law. Tammi contended that there was no issue of fact on damages and that damages should be decided by the court as a matter of law. (Dkt. #79). He further claimed that he was entitled to all damages claimed in his amended disclosure on the grounds that it constituted "pecuniary loss" related to the nonconformity. Porsche asserted that Tammi was not entitled to collect damages

beyond his lease payments. The district court concluded that a damage question should be submitted to the jury regarding pecuniary loss but that a specific instruction on pecuniary loss was not necessary. (Dkt. #83, p. 416). The following damage question was submitted to the jury:

> 3. What amount of money will compensate plaintiff for any pecuniary loss caused by the continued non-conformity?

(Dkt. #50).

The jury found that there was a nonconformity in the vehicle and awarded damages. On damages, it determined Tammi's pecuniary loss caused by the nonconformity to be $26,600.00. (Id.) Following trial, Tammi moved to change the jury's answer to the damage question. (Dkt. #54). Porsche also filed various motions after verdict. They included motions challenging the sufficiency of the evidence, as well as motions directed toward the damages issues. (Dkt. #56).

The district court denied Porsche's motions for judgment notwithstanding the verdict or to change the answer to Question No. 1 of the verdict on November 2, 2006. (Dkt. #60). It took Porsche's remaining motions, as well as Tammi's motions, under advisement. (Id.) In a decision dated March 13, 2007, the district court granted

Tammi's motion to change the jury's answers to the damage portion of the verdict and awarded him pecuniary loss of $133,079.88 ($57,458.00 lease payments and $75,621.88 lease buy-out). (Dkt. #63). The district court then doubled that amount to $266,159.76 with no offset for reasonable use. (Id.) It also ordered that Tammi was not required to return the vehicle. (Id.) A judgment was entered on March 13, 2007 in favor of Mr. Tammi for $266,159.76, plus costs. (Dkt. #64).

Porsche filed its Notice of Appeal on April 10, 2007. (Dkt. #70). The appeal was argued before the United States Court of Appeals for the Seventh Circuit on January 8, 2008, and the Seventh Circuit issued its opinion on August 4, 2008. The Seventh Circuit Court concluded that there was sufficient evidence for the jury to determine that Tammi's vehicle suffered a nonconformity that substantially impaired its use. The court also determined that because of the impact on Wisconsin consumers and manufacturers, the Wisconsin Supreme Court is best suited to address the remaining issues in this case. The Seventh Circuit certified four questions on the issue of pecuniary loss, which are the subject of this brief.

ARGUMENT

I. STANDARD OF REVIEW.

The issues here involve the interpretation and application of Wisconsin's Lemon Law. Questions of statutory construction are questions of law that the court decides under a *de novo* standard of review. ***Hughes v. Chrysler Motor Corp.***, 197 Wis. 2d 973, 978, 542 N.W.2d 148 (1994).

II. SUMMARY OF ARGUMENT.

The district court set aside the jury's $26,600 award for pecuniary loss and entered judgment in favor of Mr. Tammi for $266,159.76, plus costs. Porsche submits that the district court erred in awarding any amounts for Tammi's voluntary purchase of the vehicle and, even if such amount was recoverable, should not have been subject to the statute's doubling provisions. In addition, the district court erred in allowing Tammi to keep the vehicle and in not reducing the award by a statutorily established reasonable allowance for use.

The Wisconsin Lemon Law is a stand alone statute which provides a consumer with a statutory cause of action for a vehicle that contains a warranty nonconformity. The statute sets forth a specific scheme by which the consumer can demand a refund of the purchase price. Such scheme

also sets forth the monetary amounts to which the consumer is entitled. In exchange for those amounts, the consumer must return the vehicle to the manufacturer. From the refund amount the manufacturer is entitled to deduct a reasonable allowance for use. If the manufacturer declines to take back the vehicle, the consumer can commence an action against the manufacturer for pecuniary damages caused by a violation of the statute. The pecuniary loss caused by a violation of the statute is the specific amount the consumer should have been provided when the initial notice was given to the manufacturer for a refund. That pecuniary loss sustained by the consumer is then subject to the statute's doubling provisions. There is no provision in the statute for awarding pecuniary loss that is not specified in the statute or was not sustained by the consumer as a result of a statutory violation.

In the case of a lease, a consumer with a nonconforming vehicle is entitled to recover his lease payments under the lease, plus any sales tax and collateral costs. The consumer is also relieved of any further obligation under the lease. The vehicle lessor, not the consumer, may recover the remaining value of the lease, which would include the residual value of the vehicle. Once the lessor recovers that amount, the nonconforming

vehicle must then be returned to the manufacturer by the lessor.

In this case, Tammi was never obligated to buy the vehicle at the conclusion of the lease. He had the option of returning the nonconforming vehicle to the lessor. Instead, he voluntarily chose to purchase it. Consequently, the amount he voluntarily paid to purchase the vehicle was in no way pecuniary loss caused by Porsche's violation of the statute.

The lemon law statute is intended to protect the purchasers of new vehicles. Once the lease was terminated, Tammi purchased a used vehicle not covered under the Lemon Law. Similarly, the statute requires that in order for one to maintain an action they must satisfy the statutory definition of "consumer." While Mr. Tammi commenced this action as a "consumer," he was never a "consumer" with regard to any amounts voluntarily paid to the lessor for the vehicle. An individual who purchases a vehicle at the conclusion of a lease is no longer a consumer for purposes of claiming damages under the Lemon Law. Furthermore, the Lemon Law is designed to compensate consumers based on their contractual liability at the time the vehicle is deemed a lemon, which is either the purchase price or the consumer's lease payments.

Moreover, any amounts related to the value of the lease would not be subject to the statute's doubling provision. The statute provides for an award of twice the amount of the consumer's pecuniary loss. There is no provision within the plain language of the statute for the consumer to receive any damages for the value of the lease. Those are potential damages of the lessor. Since the amounts paid by Tammi to voluntarily purchase the vehicle are not his pecuniary loss, this court should conclude that such amounts are not subject to the doubling provisions of the statute. Such doubling would amount to awarding the consumer more than twice his pecuniary loss.

In addition to double damages, the district court also allowed Tammi to keep the vehicle. The statutory scheme clearly requires a consumer to return the vehicle upon receipt of a refund. This applies whether the vehicle is purchased or leased. Since the purchase price is being refunded, retention of the vehicle is never part of the consumer's pecuniary loss. Once the consumer receives the refund due under the statute, he is compensated in full. By allowing the consumer to keep the vehicle after receiving double damages, the consumer more than doubles his pecuniary loss. Furthermore, return of the vehicle is consistent with the remedial purpose of the statute of

relieving the consumer of any responsibility for the nonconforming vehicle and obligating the manufacturer to dispose of the vehicle and make any necessary disclosures.

Once a refund has been made to a consumer, the manufacturer is also entitled to a reasonable allowance for use. This is for use prior to the first report of the warranty nonconformity. Again, the commencement of an action for violation of the statute does not eliminate this set-off. The reasonable use allowance is an amount the consumer would have had to pay even if the refund had been provided in response to the initial notice. It is not part of his pecuniary loss. Moreover, the Wisconsin pattern jury verdict clearly includes a reasonable allowance for use in the verdict to be submitted to the jury in an action under §218.0171(7) of this statute.

III. THE MEASURE OF PECUNIARY LOSS UNDER THE LEMON LAW FOR A CONSUMER WHO LEASES A VEHICLE IS LIMITED TO THE AMOUNT FOR WHICH THE LEASE OBLIGATED THE CONSUMER AND DOES NOT INCLUDE AMOUNTS RELATED TO A CONSUMER'S VOLUNTARY PURCHASE OF THE VEHICLE AT THE CONCLUSION OF THE LEASE.

A. The Wisconsin Lemon Law Limits Recovery To Damages Caused By A Violation Of The Statute.

Throughout the litigation, and at trial, Tammi argued that his claim for damages was under §218.0171(7), Wis. Stats. and, as a result, his damage claim was not limited

to the statutory damages set forth in §218.0171(2)(b)3, Wis. Stats. Tammi asserted that he was entitled to collect any pecuniary loss associated with the warranty nonconformity. (Dkt. #39). Such an argument was necessary in order for him to claim damages for costs which were not "collateral costs" as defined by the statute (i.e. insurance payments, floor mats, etc.) and in order to make a claim for amounts related to his voluntary purchase of the vehicle.

Eventually, the district court decided to submit a question to the jury which asked the jury to determine the amount of Tammi's pecuniary loss caused by the nonconformity. In response to that question, the jury determined that Mr. Tammi's pecuniary loss related to the nonconformity was $26,600.00. Tammi was not satisfied with the amount awarded by the jury and moved the court to change the answers to the damage question. Ultimately, the district court concluded that Tammi's claim for damages was not limited to those amounts set forth in §218.0171(2)(b)3 and that the jury's award of damages was inadequate as a matter of law. Such an interpretation of the statute is directly contrary to its plain wording, as well as its interpretation by the Wisconsin appellate courts.

The Wisconsin courts have long recognized that the Lemon Law stands alone. It provides a statutory scheme which is not dependent upon other statutes, such as the Uniform Commercial Code. As stated by the Wisconsin Supreme Court in ***Hertzberg v. Ford Motor Co.***, 242 Wis. 2d 316, 626 N.W.2d 67 (2001):

> This language signals that the lemon law is a "stand alone" statute which is not dependent upon, or qualified by, the UCC. Both Dieter and Hughes expressly recognized the inadequacies in the UCC as an enforcement tool in this area. In light of that history, you should not build back into the lemon law the short comings and road blocks of the UCC.

§218.0171(7), states the following as to what is recoverable upon proof of a statutory violation:

> 7. In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by violation of this section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney's fees and any equitable relief the court deems appropriate.

(emphasis supplied). The Wisconsin courts have also recognized that §218.0171(7) is a separate and distinct cause of action under the Lemon Law, and that an action under this section limits the consumer to the remedies under this section. ***Estate of Riley v. Ford Motor Co.***, 248

Wis. 2d 193, 202, 635 N.W.2d 635 (Rev. Denied, 643 N.W.2d 94, 250 Wis. 2d 557).

Under the plain statutory language, an action under §218.0171(7) is for damages caused by a violation of the statute. In the case of the Lemon Law, the statute is violated when the manufacturer fails to refund the purchase price and the other recoverable amounts set forth in the statute after proper notice. It is for these amounts that a consumer may bring an action under §218.0171(7).[1]

Requiring a causal link between the statutory violation and any recoverable pecuniary loss is consistent with this Court's interpretation of other consumer protection statutes. Wis. Stat. § 100.18(11)(b)2, Wisconsin's Deceptive Trade Practices Act, provides that:

> Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees.

[1] The Wisconsin pattern jury verdict sets forth a model verdict question for Lemon Law damages. Wis. JI-Civil 3300. The proposed verdict question includes those statutory damages to which the consumer would be entitled upon demanding a refund. It does not treat pecuniary loss as something different or allow for additional damages beyond those set forth in § 218.0171(2)(b).

(emphasis provided). The court in ***K&S Tool & Die v. Perfection Mach.***, 301 Wis. 2d 109, 129, 732 N.W.2d 792 (2007), stated that § 100.18(11)(b)2 requires a "causal connection between the [violation] and the pecuniary loss."

Similarly, Wis. Stat. § 100.20(5), part of Wisconsin's Home Improvement Practices Act, provides that:

> Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

(emphasis supplied). In ***Snyder v. Badgerland and Mobile Homes, Inc.***, 260 Wis. 2d 770, 784-85, 659 N.W.2d 887 (Ct. App. 2003), the court held that a loss must be sustained because of a violation.

Tammi's voluntary purchase of the vehicle prior to the conclusion of the lease was not caused by a violation of the statute. He was only obligated under the lease contract to make lease payments. His purchase of the vehicle and the early termination of the lease were voluntary acts. The claimed violation of the Lemon Law did not cause Tammi to purchase the vehicle. He could have avoided incurring any costs related to the vehicle's purchase from the lessor by allowing the lease to terminate

and returning the vehicle to the lessor. Instead, he chose to purchase the vehicle because he felt it was a good deal. Because he was given the choice, and was in no way obligated to purchase the vehicle, his voluntary purchase of the vehicle was not the result of a violation of the Lemon Law. Therefore, any pecuniary loss must be cut off at the point where the manufacturer's claimed violation ceased to cause the loss.

Furthermore, the use of the term "any damages" in subsection (7) does not mean all damages that may be linked to the nonconforming vehicle. ***Gosse v. Navistar Int. Transp. Co.***, 232 Wis. 2d 163, 605 N.W.2d 896 (1999). In ***Gosse***, the plaintiff contended that the legislature intended to allow consumers to recover all damages that might be linked to a lemon law violation, including personal injury. The Court of Appeals expressly rejected this argument, indicating as follows:

> Considering the lemon law's purpose, §218.015(7), Stats., does not allow a consumer to seek personal injury damages for a lemon law violation. §218.015(7) allows the consumer to bring an action to recover any damages caused by a violation of this section. The lemon law is violated when a vehicle does not conform to the express warranty and the manufacturer does not fix the nonconformity, replace the vehicle or give the consumer a refund. To interpret §218.015(7) to mean that

> personal injuries could be caused by a violation of the lemon law would impermissibly expand the scope of the statute.

233 Wis. 2d at 172-73 (emphasis supplied). Hence, the pecuniary loss recoverable under §218.0171(7) is not open ended, but rather limited to the damages set forth in the statute.

The case law has consistently interpreted the pecuniary loss recoverable under the Lemon Law as those damages caused by a violation of the statute. In ***Church v. Chrysler Corp.***, 221 Wis. 2d 460, 585 N.W.2d 685 (Ct. App. 1998), the Wisconsin Court of Appeals stated as follows:

> The purpose of the lemon law is to return the purchaser of a lemon to the position he or she was in at the time the vehicle was purchased. The statute allows the consumer to recover twice the amount of pecuniary loss in addition to other expenses. The manufacturer violates the law by wrongfully refusing to honor this refund, the consumer suffers pecuniary loss in the amount of the refund he or she should have received. A consumer's pecuniary loss includes that portion of the purchase price he or she has actually paid. We conclude, as to the trial court, that the goal of the lemon law is not served by refunding more than the amount which the consumer actually paid for the vehicle.

(Emphasis supplied).

In ***Nick v. Toyota***, 160 Wis. 2d 373, 466 N.W.2d 215 (Ct. App. 1993), the court was specifically asked to interpret the term "pecuniary loss" in a situation involving a vehicle repurchase. The court in ***Nick*** indicated:

> Wisconsin's Lemon Law is unambiguous in providing that a consumer entitled to receive a refund is entitled to the full purchase price plus any sales tax, finance charge, amount paid at the time of sale and collateral costs, less a reasonable allowance for use. This settlement divided between the consumer and any holder of a perfected security interest, according to their respective interests. When the manufacturer violates the law by wrongfully refusing to honor this refund, the consumer suffers pecuniary loss in the amount of the refund he should have received.
>
> Pecuniary loss includes that portion of the purchase price he has actually paid, whether by down payment or loan payments. The holder of the perfected security interest receives that portion of the purchase price it has paid, less Nick's payments on the loan's principal.

160 Wis. 2d at 383. (Emphasis supplied.)

In the ***Nick*** decision the Court of Appeals concluded that the pecuniary loss contemplated by the lemon law included the amount of the purchase price the plaintiff actually paid, whether by down payment or loan payments, but not the remaining principal. A subsequent Wisconsin

Supreme Court decision, ***Hughes v. Chrysler Motor Corp.***, 197 Wis. 2d 973, 542 N.W.2d 148 (1994), did not overrule ***Nick*** in its entirety. While the ***Hughes*** court rejected this interpretation, and held that pecuniary loss includes the full purchase price of the vehicle, including any amounts financed, it specifically recognized the ***Nick*** definition of what is included in pecuniary loss under the statute:

> The Wisconsin Lemon Law is violated when the manufacturer fails to voluntarily replace or repurchase the lemon law within 30 days after receipt of the consumer's Wis. Stat. §218.015(2)(c) demand. This failure to voluntarily comply with the lemon law establishes a violation of the law and triggers the §218.015(7) remedies of the law.

197 Wis. 2d at 981. The Wisconsin Supreme Court was quick to point out that any language in ***Nick*** contrary to the holding of ***Hughes*** that the pecuniary loss includes the full purchase price of the vehicle to the consumer was overruled. 197 Wis. 2d at 985.

Accordingly, ***Hughes*** and ***Nick*** are readily reconcilable. Upon proof of a violation of the statute, the consumer's pecuniary loss is limited to those amounts to which the consumer was entitled under the refund or replacement portions of §218.0171(2)(b). ***Hughes*** does not stand for the proposition that a consumer is entitled to seek any damages

related to a warranty nonconformity. A pecuniary loss claim under the lemon law is limited to those damages due the consumer for a manufacturer's failure to refund the amounts set forth in the statute.

The district court reasoned that since pecuniary loss was not specifically defined in §218.0171(7), it should be interpreted as covering more damages than just those recoverable under §218.0171(2)(b). In the district court's opinion, the legislature could have limited damages to those set forth in §218.0171(2)(b) but chose not to do so. Such reasoning ignores the fact that the term "pecuniary loss" was used due to the existence of two distinct causes of action in the statute with different damage remedies. A consumer can either commence an action under §218.0171(2)(b) for refund or replacement, or commence a separate action under §218.0171(2)(a) for failure to repair. Each cause of action provides a separate basis for relief under §218.0171(7). ***Vultaggio v. General Motors Corp.***, 145 Wis. 2d 874, 429 N.W.2d 93 (Ct. App. 1988). In ***Vultaggio***, the plaintiff presented an alternative claim premised upon §218.015(2)(a), Wis. Stats. (currently §218.0171(2)(a)). Plaintiff contended that subsection (2)(a) created a separate basis for relief under §218.015(7), Wis. Stats. and was a remedy independent of

§218.015(2)(b), Wis. Stats. (currently §218.0171(2)(b)). The court agreed, indicating:

> Subsection (2)(b) contains a series of conditions which, if satisfied, entitle the consumer to the remedies of refund or replacement. These remedies are unavailable for violations of subsection (2)(a). In this matter subsections (2)(a) and (2)(b) are best viewed as addressed to different obligations of the manufacturer: a duty to repair a defective vehicle, in subsection (a) and in subsection (b), a duty to replace or refund the cost of the vehicle which is subject to an inordinate amount of repair. With their different requirements and remedies, subsection (2)(a) does not render subsection (2)(b) superfluous.

145 Wis. 2d at 891; *see also* ***Dussault v. Chrysler Corp.***, 229 Wis. 2d 296, 600 N.W.2d 6 (Ct. App. 1999). This separate cause of action under §218.0171(2)(a) is available to consumers who are unable to demonstrate the reasonable attempt to repair requirement of §218.0171(2)(b). The pecuniary loss for this statutory violation is not the same as the pecuniary loss for failure to refund or replace the vehicle. Damages are limited to pecuniary loss arising from the manufacturer's failure to repair. Hence, the need for the term "pecuniary loss" in §218.0171(7).

The above reasoning is confirmed by the pattern jury verdict for lemon law cases. The pattern jury verdict contains separate sets of questions for claims arising from

the failure to repair and claims arising from failure to refund/replace. The jury committee comments indicate:

> The special verdict covers two separate claims. Questions 1, 2, 3, 4, 5 deal with remedies established under Wis. Stat. §218.015(2)(b) - replacement or refund. Questions 1, 6, 7 deal with the remedy established under Wis. Stat. §218.015(2)(a). The distinction between the two claims is described in ***Vultaggio v. General Motors***, 145 Wis. 2d 874, 891, 429 N.W.2d 93 (1988).

Wis. JI-Civil 3303.

With the existence of two distinct claims for distinct pecuniary loss, it is clear why the term "pecuniary loss" was used in §218.0171(7). The pecuniary loss, however, is limited to damages caused by a violation of the specific section under which the consumer is proceeding. In this case, Tammi's pecuniary loss is limited to the damages set forth under §218.0171(2)(b)3.

B. Tammi's Pecuniary Loss Is Limited To The Amount He Was Entitled To Recover As A Lessee When He Demanded A Statutory Refund.

When purchasing a vehicle, a consumer has financing choices on how to obtain that new vehicle and those choices carry different levels of liability for the consumer. For example, a consumer who chooses to pay cash and finance a new vehicle, owns the vehicle and is liable for the entire purchase price. Whereas a consumer who leases a new

vehicle has no ownership interest in the vehicle, and purchases the contractual right to use the vehicle for a specified period of time. This limits the liability of the consumer to the monthly payments for the applicable lease terms of twenty-four, thirty-six, or forty-eight months. Leases typically include a buy-out value, which is the amount the consumer would have to elect to pay to purchase the car. At all times, the leased vehicle is owned by the lessor. There is no obligation to purchase and no assumption that the lessee intends to purchase the vehicle at the end of the lease. At the end of the lease, the vehicle is no longer considered a new vehicle. Due to these fundamental differences between purchasing a vehicle versus leasing, the statute provides for different remedies.

Because a lessee does not own the vehicle, the lessee may only demand a refund for what he or she has paid under the lease and has no right to control the lessor's ownership interest in the leased vehicle.[2] Therefore, the

---

[2] The pecuniary loss sustained is limited to the consumer's initial choice of liability. The manufacturer should not be punished for giving the consumer the option to lease a new vehicle when this option allows the consumer to carry less liability because the lessor is the actual vehicle owner. Tammi chose to lease the new vehicle and unfortunately, it was deemed to be a lemon. Tammi voluntarily purchased the vehicle he claimed was a lemon.

Lemon Law provides for separate refunds and separate procedures for the lessee to obtain a refund. In this case, the lemon law defines a lessee's pecuniary loss as follows:

> §218.0171(2)(b)3. With respect to a consumer described in (1)(b)4, 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.

(Emphasis supplied).

Under the above statutory scheme, the consumer is entitled to his lease payments under the lease, plus any sales tax and collateral costs. The "current value of the written lease" (the residual value of the vehicle), describes the refund that the lessor, not the lessee, may be entitled to receive. Once the consumer receives a refund of the amounts set forth in the statute, he has been made whole and the lease can no longer be enforced against

---

voluntarily purchased the vehicle he claimed was a lemon. The voluntary purchase of this vehicle should not add to the consumer's liability covered under the lemon law because the subsequent purchase was in no way caused by the manufacturer's lemon law violation.

the consumer. The value of the lease, including the residual value of the vehicle, is not damage sustained by the consumer. If the consumer is not entitled to collect such amount upon request for a refund or replacement, it cannot be pecuniary loss sustained by the consumer as a result of a statutory violation. There is no provision within the plain language of the statute for the consumer to receive any damages beyond the pecuniary loss defined by the statute. Since Tammi cannot explain how his voluntary purchase of the vehicle at expiration of the lease represents pecuniary loss to him arising from a statutory violation,[3] this court should conclude that such amount is not recoverable under the Lemon Law.

The above interpretation of the amounts refundable in a lease situation was confirmed by the Court of Appeals in ***Estate of Riley v. Ford Motor Co.***, 248 Wis. 2d 193, 635 N.W.2d 635 (Rev. Denied, 643 N.W.2d 94, 250 Wis. 2d 557). In that case involving a lease, the court specifically concluded that Ford was not obligated to pay Riley the current value of the written lease, because he was not

---

[3] The district court recognized this fact when it observed, during a discussion of Tammi's damages before verdict, that the $75,000.00 buy-out was not a lease cost that Tammi was obligated to pay under the lease. (Dkt.#79, p.8).

entitled to the current value of the written lease under the statute. The court indicated:

> The consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out that amount of money. The lessor (and/or holder) owns a leased vehicle and, if it is a lemon, the lessor owns a lemon. When the consumer chooses a refund, he or she must return the vehicle to the manufacturer, the lessor does not have the vehicle and must be compensated for the value of the vehicle.

It should be noted that the plaintiffs petitioned the Wisconsin Supreme Court for review of the ***Estate of Riley*** and such petition was denied. ***Riley*** is consistent with the lemon law which unambiguously provides that the current value of the written lease is to be paid to the motor vehicle lessor, not the consumer. Accordingly, it cannot be considered an element of pecuniary loss since the consumer was never obligated to pay the lessor any such amount.[4]

Wisconsin Lemon Law cases reflect that pecuniary loss recoverable under the Lemon Law is limited to the

---

[4] Tammi cannot enhance his damages by voluntarily purchasing the vehicle from the lessor since it is not a cost incurred by him as a result of any statutory violation. Moreover, there was no evidence that Tammi was ever assigned the lessor's claim for the written value of the lease.

consumer's liability exposure caused by a violation of the statute. In ***Hughes***, the court held that the pecuniary loss sustained by the purchaser of a new vehicle included the purchase price of the vehicle regardless of how the purchaser paid for the new vehicle. ***Hughes v. Chrysler Motor Corp.***, 197 Wis. 2d 973, 986, 542 N.W.2d 148 (1994). The court reasoned that whether the purchaser paid for the new vehicle in cash or financed the vehicle, the purchaser's liability was the purchase price in both cases. ***Id.*** at 984-85. Similarly, in ***Riley***, the court held that "pecuniary loss when a lemon is a leased vehicle does not include the current value of the written lease." ***Estate of Riley v. Ford Motor Co.***, 248 Wis. 2d 193, 200-01, 635 N.W.2d 635 (Rev. Denied, 643 N.W.2d 94, 250 Wis. 2d 557). When the consumer is a lessee, the pecuniary loss "does not include the termination value of the vehicle because the consumer is not out that amount of money." ***Id.*** at 202. Read together, ***Hughes*** and ***Riley*** reflect the court's intent to make the consumer whole based on the consumer's contractual liability caused by the vehicle manufacturer's violation of the lemon law.

C. Tammi Was No Longer A Consumer As Defined By The Lemon Law When He Purchased The Vehicle From The Lessor.

In order to recover damages under the Wisconsin Lemon Law, a consumer must satisfy the statutory definition of "consumer." Various categories of "consumer" are defined in Wis. Stat. §218.0171(1)(b). The category under which an individual qualifies as a consumer dictates whether any relief is recoverable. If, at the time the alleged violation occurred, the individual qualified as a consumer under §218.0171(1)(b)4, then the individual is entitled to recover only lease payments, sales tax and collateral costs, less a reasonable allowance for use. Nowhere in the statute is an individual who leases a vehicle permitted to recover the remaining value of the leased vehicle. The remedies are mutually exclusive and not interchangeable. ***Varda v. General Motors Corp.***, 242 Wis.2d 756, 776, 626 N.W. 2d 346 (Ct. App. 2001). Moreover, an individual who voluntarily purchases a leased vehicle at the end of the lease period disqualifies himself as a consumer under Wis. Stat. §218.0171(1)(b)4. ***Id.*** (holding the Wisconsin lemon law was not intended to include former lessees who purchased the vehicle under the lease). Additionally, since the vehicle which Tammi purchased at the end of the lease was not new, he would not satisfy any of the

definitions of consumer which are necessary to qualify him under the statute.

Wisconsin's Lemon Law is a remedial, not punitive, statute designed to protect purchasers of new vehicles. *See* ***Hughes***, 197 Wis. 2d at 982 ("Wisconsin's Lemon Law is obviously remedial in nature."). The case law has continually emphasized that the protection was intended for new vehicles. ***Id.*** at 980 (stating that Wisconsin's Lemon Law provides "remedial assistance to consumers who purchased defective new automobiles." (emphasis supplied)); ***Garcia v. Mazda Motor of America***, 273 Wis. 2d 612, 615, 682 N.W.2d 365 (2004) (the Lemon Law is "a remedial statute enacted to protect buyers of new vehicles." (emphasis supplied)); ***Church***, 221 Wis. 2d at 466 (stating that Wisconsin's Lemon Law is a "remedial statute designed to rectify the problem a new car buyer has when that new vehicle is a 'lemon'" (quoting ***Nick v. Toyota Motor Sales***, 160 Wis. 2d 373, 381, 466 N.W.2d 215, 218 (Ct. App. 1991))(emphasis supplied)); ***Schey v. Chrysler Corp.***, 228 Wis. 2d 483, 486, 597 N.W.2d 457 (Ct. App. 1999) (concluding that "when creating [the Lemon Law], the legislature did not intend for previously-owned vehicles to be covered."); ***Gosse***, 232 Wis. 2d at 172 (stating that "[t]he Lemon Law was enacted to give consumers a means by

which to ensure that a newly purchased vehicle would conform to its warranty." (emphasis supplied)). Manufacturers do not want to produce lemons, but when such an unfortunate scenario occurs, the Lemon Law provides consumers with a means to enforce the warranty of a newly purchased vehicle. ***Id.***; ***Hughes***, 197 Wis. 2d at 981. Previously owned vehicles are not covered under § 218.0171, Wis. Stats. ***Schey***, 228 Wis. 2d at 486.

In ***Schey***, the court concluded that a vehicle that had been leased for six months, returned to the dealership, and later purchased was no longer a new vehicle even though the vehicle had an unexpired warranty and was within one year from the date of first delivery to a consumer. ***Id.*** at 485-86. It was not until shortly after the purchase that Schey realized he had purchased a lemon. ***Id.*** at 486. Considering the statutory language and legislative history, the court concluded that once a motor vehicle leaves the control of the dealer, it is no longer considered a new vehicle and therefore, not covered by the Lemon Law. ***Id.*** at 491. The legislative history reveals that the legislature thought it unnecessary to add "new" before "motor vehicle" throughout the statute because it was clear that the statute referred only to new vehicles. ***Id.*** at 490.

In accordance with ***Schey***, once a vehicle lease is terminated, the subsequent purchaser of the vehicle is purchasing a used vehicle, which is not covered by § 218.0171. Accordingly, when Tammi voluntarily purchased the vehicle at the end of the lease, he was not the purchaser of a new vehicle.

It is of no consequence that the lessee and the purchaser are the same person. The statute is concerned with the status of the vehicle at the time of purchase. The often stated purpose behind Wisconsin's Lemon Law is to "provide an incentive for a manufacturer to put the purchaser of a new car back to the position the purchaser thought he or she was in at the time they bought the car." ***Hughes***, 197 Wis. 2d at 976, 982 (emphasis supplied). When the vehicle being purchased is no longer a new vehicle - that vehicle ceases to be covered under the Lemon Law.

Although Tammi was both the lessee and the subsequent purchaser, the statute was only intended to protect Tammi as the lessee of the new vehicle. As a purchaser, Tammi purchased a used vehicle not covered under the Lemon Law. Had Tammi terminated his lease, returned the vehicle to the dealership, and allowed a third party to purchase the vehicle, whether or not the vehicle was a known lemon, the third party purchaser would not be afforded protection

under the statute. Nothing in the statute indicates that a different outcome was intended based on the status of the purchaser; the statute is concerned with the status of the vehicle in order to protect purchasers from buying nonconforming new vehicles.

In this case, Tammi initially leased the vehicle and commenced this action as the lessee of the vehicle. At the time he commenced this action, he was a consumer entitled to a refund of his lease payments, but not the written value of the lease. Near the conclusion of the lease Tammi voluntarily purchased the vehicle. At the time of purchase, Tammi was no longer a consumer under the statute who was entitled to recover the amounts paid to purchase the vehicle. Because Tammi was no longer a consumer as it relates to the purchase of the vehicle from the lessor, he is only entitled to the relief that was available at the time he initiated the subject action. As a lessee, he is not entitled to recover the purchase price of the vehicle, pursuant to Wis. Stat. §218.0171(2)(b)3. A voluntary purchase of the vehicle at lease termination does not endow Tammi with the right to claim damages he could not claim when the lemon law notice was served and the statute violated. To allow compensation for this amount would put

Tammi in a position better than the remedies contemplated by the statute.

IV. IF A CONSUMER IS ENTITLED TO RECOVER THE VEHICLE PURCHASE PRICE WHEN HE VOLUNTARILY EXERCISED A LEASE OPTION TO PURCHASE THE VEHICLE, THE AMOUNT OF THE PURCHASE PRICE DOES NOT QUALIFY AS PECUNIARY LOSS SUBJECT TO THE STATUTE'S DOUBLING PROVISION.

Tammi contends that he is not only entitled to the cost of voluntarily purchasing the vehicle from the lessor, but that such amounts are subject to the doubling provisions of the statute. This is clearly contrary to the statutory scheme. As discussed above, it is clear that the consumer's pecuniary loss does not include the written value of the lease. That amount is to be refunded to the lessor and is not an obligation of the consumer. There is no provision that allows the lessor to commence an action for double the amount of its alleged loss. Moreover, Tammi cannot establish that his voluntary purchase of the vehicle was caused by Porsche's violation of the statute. Subsection 218.0171(7) allows consumers to commence an action for double damages for a violation of the statute. Consequently, even if the court were to conclude that the voluntary purchase of the vehicle puts Mr. Tammi in the shoes of the lessor, such damages would not be recoverable

as damages sustained by the consumer and thus, not subject to the doubling provisions of the statute.

V. IF A CONSUMER IS ENTITLED TO RECOVER ANY DAMAGES FOR THE VEHICLE PURCHASE PRICE WHEN HE VOLUNTARILY EXERCISED A LEASE OPTION TO PURCHASE THE VEHICLE, THEN SUCH VEHICLE MUST BE RETURNED TO THE MANUFACTURER.

The district court determined that Tammi was not only entitled to damages for leasing and purchasing the vehicle, but was also entitled to retain possession of the vehicle. The district court claims that since the statute is silent on this aspect, it would be consistent with the remedial purposes of the statute to allow the consumer to keep the vehicle even after being reimbursed for twice the amount of his pecuniary loss. The district court's conclusion is contrary to the plain meaning of the statute and inconsistent with the policy behind it.

Initially, it should be noted that a court cannot rewrite a statute or apply statutory rules of construction simply because the statute has been described as remedial. *See*, ***Bushendorf v. Freightliner Corp.***, 13 F.3d 1024, 1026 (7th Cir. 1993). The district court ignored such authority in reaching the conclusion that Tammi is entitled to keep the vehicle.

When a manufacturer provides a refund to a lessee under the statute, it must also pay the lessor the current

value of the lease. Upon receipt of that amount, the title to the nonconforming vehicle must be tendered to the manufacturer. The manufacturer is then required to brand the title of the vehicle and dispose of it. A similar procedure is required when a refund is supplied to a consumer who purchases or finances a vehicle. Such a procedure is consistent with the purpose of the legislation, i.e., to make the consumer whole, allow the consumer to dispose of the nonconforming vehicle, and burden the manufacturer with the nonconforming vehicle. There would be no purpose in allowing a consumer to keep a vehicle which is purportedly a lemon after he has received double his pecuniary loss.

This obligation does not change simply because an action is being brought for pecuniary loss under §218.0171(7). As discussed previously, an action under this statute is for pecuniary loss sustained for a violation of this statute. Such pecuniary loss is statutorily defined and the requirement to return the vehicle upon payment of the remedies is included in any refund or replacement scenario. There is no authority that a suit under subsection (7) allows the consumer to keep the vehicle in addition to recovering double the pecuniary loss caused by a violation of the statute. Retention of the

vehicle cannot be pecuniary loss since the consumer receives full compensation for his purchase or lease of the nonconforming vehicle in any suit under subsection (7).

Moreover, the Lemon Law allows the consumer to recover only twice the amount of pecuniary loss as a result of the manufacturer's violation of the Lemon Law. The statute does not authorize the award of additional damages. In addition to multiplying Tammi's claimed pecuniary loss by two, the district court also allowed Tammi to keep the vehicle. If we assume that the vehicle has a current value of $65,000.00 - $70,000.00, Tammi has received more than twice his pecuniary loss. Hence, he is now put in a better position than the one he was in before he purchased the vehicle and better than the double damage award specified by the statute.

In addition, §218.0171(2)(d) sets forth the following requirements:

> (d) No motor vehicle returned by a consumer or motor vehicle lessor in this state under par. (b), or by a consumer or motor vehicle lessor in another state under a similar law of that state, may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.

Clearly, the statute contemplates that the nonconforming vehicle is to be returned to the manufacturer

and that the manufacturer is to take steps to make full disclosure. Such a policy is consistent with the statute's purpose of compensating the consumer and placing the obligation on the manufacturer to dispose of the vehicle. Because keeping the vehicle is not part of the consumer's pecuniary loss and the manufacturer is responsible for disposing of the vehicle and making the proper disclosures, it follows that the statute's purpose is fulfilled by a return of the vehicle to the manufacturer upon payment of double damages.

VI. A CONSUMER'S DAMAGES MUST BE REDUCED BY A REASONABLE ALLOWANCE FOR USE.

Under §218.0171(2)(b)3a, a consumer's refund must be reduced by a reasonable allowance for use. Despite this provision, the district court concluded that no reduction for reasonable use was allowable since this action was commenced under §218.0171(7). Again, the district court's reasoning ignores the fact that reasonable use of the vehicle is an amount which is to be deducted from any refund provided to the consumer. The reasonable use allowance is for use of the vehicle before the nonconformity is first reported. In other words, it is for use of the vehicle when it was problem-free. A consumer is not entitled to free use of the vehicle even if the vehicle

is replaced or refunded since this is not a portion of any pecuniary loss. The entitlement to such a deduction is not extinguished simply because an action is commenced under Subsection (7).

The need to determine a reasonable allowance for use even after the statute is violated and an action is commenced under §218.0171(7) is recognized by the Wisconsin pattern jury instructions. The form verdict includes a jury question on a reasonable allowance for use. Wis. JI-Civil 3300. Such a question would be unnecessary if the district court's reasoning was correct.

In ***Church v. Chrysler***, 221 Wis. 2d 460, 585 N.W.2d 685 (Ct. App. 1988), the Court of Appeals was faced with the issue of whether the 30 day period had been violated by Chrysler. However, on appeal the plaintiff raised the issue of the usage allowance. While not directly addressing the use issue, the court indicated:

> Finally, the Churches dispute Chrysler's computation of the usage allowance and finance charges. See §218.015(2)(b)2.b, Stats. The trial court did not reach these issues since it had ruled that Chrysler had not violated the thirty-day time limit. Our review of the summary judgment record reflects a sharp dispute of material fact as to the proper amount of these items. 4 These matters must be tried on remand.

Certainly there would have been no reason for the appellate court to direct that this issue be addressed on remand if such a deduction is not permissible as a matter of law once an action has been commenced by a consumer under §218.0171(7).

The statutory formula for calculating a reasonable allowance for use is set forth in §218.0171. In this case it was stipulated between the parties that the mileage on the vehicle was 6,576 at the time the alleged warranty nonconformity was first reported. (Dkt. #79, pp. 26-27). The total amount for which the lease obligated Mr. Tammi was $69,327.10 (Dkt. #1, Exh. A). Accordingly, the reasonable use allowance would be calculated as follows: $69,327.10 x 6,576/100,000 = $4,575.58. Porsche requests that any remaining judgment be reduced by that amount.

CONCLUSION

For the foregoing reasons, Porsche requests that the four questions certified by the United States Court of Appeals for the Seventh Circuit be answered as follows:

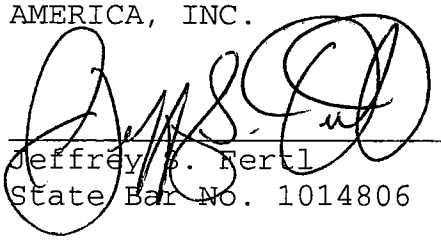
> 1. A consumer under §218.0171(1)(b)4 who, after making his lemon law demand, exercised an option to purchase and buys the vehicle is not entitled to recover the amount of the purchase price in an action pursuant to subsection (7).

2. If the consumer under §218.0171(1)(b)4 is entitled to recover the vehicle purchase price when he exercises the purchase option, the purchase amount does not qualify as pecuniary loss subject to the doubling provisions in subsection (7).

3. A consumer entitled to recover any damages for the vehicle purchase price when he exercises the purchase option in the lease must return the vehicle to the manufacturer.

4. A damage award under subsection (7) is subject to a reduction for reasonable use of the vehicle.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant, PORSCHE CARS NORTH AMERICA, INC.



Jeffrey S. Fertl
State Bar No. 1014806

P. O. ADDRESS:

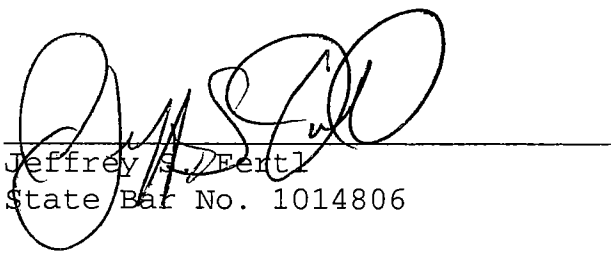
Hinshaw & Culbertson LLP
100 E. Wisconsin Ave., #2600
Milwaukee, WI 53202-4115
414-276-6464

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), Stats., for a brief produced using the following font: Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 43 pages.

Dated this 17th day of October, 2008.

HINSHAW & CULBERTSON LLP



Jeffrey S. Fertl
State Bar No. 1014806

P. O. ADDRESS:

100 E. Wisconsin Ave., #2600
Milwaukee, WI 53202
414-276-6464

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

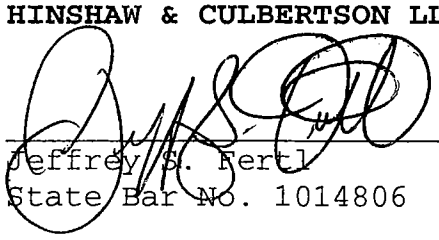
(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

Dated this 17th of October, 2008.

HINSHAW & CULBERTSON LLP



Jeffrey S. Fertl
State Bar No. 1014806

P. O. ADDRESS:

100 E. Wisconsin Ave., #2600
Milwaukee, WI 53202
414-276-6464

Appendix

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

BRUCE A. TAMMI,

Plaintiff,

v. Case No. 04-C-1059

PORSCHE CARS NORTH AMERICA, INC.,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO CHANGE VERDICT AND DIRECTING ISSUANCE OF JUDGMENT

On August 24, 2006, following the trial in this case, the jury issued its special verdict, finding that plaintiff Bruce A. Tammi's 2003 Porsche had a nonconformity covered by the manufacturer's express warranty, which substantially impaired the use, value or safety of the vehicle. Further, the jury determined that Tammi had provided defendant Porsche Cars North America, Inc., with at least four opportunities to repair a nonconformity within the first year after delivery of the vehicle and awarded $26,600.00 compensation for "any pecuniary loss" caused by the nonconformity.

A general damage's instruction was given to the jury. However, Tammi argued then that a specific "lemon law" damages instruction be given regarding "pecuniary loss" or that certain damages be awarded as a matter of law. He now renews the motion for damages as a matter of law.

Although Tammi's request is not labeled as a Rule 50 motion, the court treats it as such. As a consequence and for the following reasons, the court agrees with Tammi and concludes that the answer to the damages question must be changed as a matter of law.

Tammi brought his case invoking the court's diversity jurisdiction. Tammi's claim arises under the Wisconsin lemon law, Wis. Stat. § 218.0171. Further, both parties argue Wisconsin substantive law and no other state's law apply. Therefore, Wisconsin law applies. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938).

The court must apply state substantive law as enacted by the state legislature and as interpreted or declared by the state's highest court. *See Home Valu, Inc. v. Pep Boys – Manny, Moe and Jack of Del., Inc.*, 213 F.3d 960, 963 (7th Cir. 2000); *see also Erie*, 304 U.S. at 78-79. However, if the Wisconsin Supreme Court has not spoken on the issue and the law is unclear, this court must predict how the state supreme court would decide the questions presented. *Rodman Indus., Inc. v. G & S Mill, Inc.*, 145 F.3d 940, 942 (7th Cir. 1998). In these instances, decisions of the state's intermediate appellate courts are authoritative unless there is a split among those courts or "there is a compelling reason to doubt that the courts have got the law right." *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1319 (7th Cir. 1995), *quoted in Home Valu, Inc.*, 213 F.3d at 963. Always, the question is how this court thinks the Supreme Court of Wisconsin would rule. *Home Valu, Inc.*, 213 F.3d at 963-64. However, federal courts sitting in diversity should hesitate to expand state law in the absence of any indication of intent by the state courts or legislature. *King v. Damiron Corp.*, 113 F.3d 93, 97 (7th Cir. 1997). Generally, when faced with two equally plausible interpretations of state law, the federal court should choose the interpretation which restricts liability, rather than an expansive interpretation which creates substantially more liability. *Home Valu, Inc.*, 213 F.3d at 963.

The Wisconsin lemon law, Wis. Stat. § 218.0171, is a remedial statute enacted to protect consumers of new motor vehicles. *See Garcia v. Mazda Motor of Am., Inc.*, 2004

WI 93, ¶¶ 1, 9, 273 Wis. 2d 612, ¶¶ 1, 9; *Church v. Chrysler Corp.*, 221 Wis. 2d 460, 466 (Ct. App. 1998).[1] It is meant to provide an incentive for a manufacturer to put the consumer in the position the consumer thought he was in at the time he purchased or leased the vehicle. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 977 (1996); *Kiss v. Gen. Motors Corp.*, 2001 WI App 122, ¶ 24, 246 Wis. 2d 364, ¶ 24.

"Consumer" includes a new motor vehicle purchaser as well as a "person who leases a motor vehicle from a motor vehicle lessor under a written lease." Wis. Stat. § 218.0171(1)(b)1, 4. The lemon law provides that a purchaser of a new motor vehicle having a nonconformity (as defined in the statute), which has not been repaired after reasonable attempts to repair (as defined in the statute), can demand that the manufacturer

> a. Accept return of the motor vehicle and replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs[, or]
> b. Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use.

§ 218.0171(2)(b)2. To receive a new vehicle or refund, a purchaser must offer to transfer title of the motor vehicle to the manufacturer.

> No later than 30 days after that offer, the manufacturer shall provide the consumer with the comparable new motor vehicle or refund. When the manufacturer provides the new motor vehicle or refund, the consumer shall return the motor vehicle having the nonconformity to the manufacturer and provide the manufacturer

[1] In 1999, the lemon law statute was renumbered from Wis. Stat. § 218.015 to § 218.0171. *Kiss v. Gen. Motors Corp.*, 2001 WI App 122, ¶ 1 n.1, 246 Wis. 2d 364, ¶ 1 n.1. The substance of the law was not changed. *Id.*

> with the certificate of title and all endorsements necessary to transfer title to the manufacturer.

§ 218.0171(2)(c).

Similarly, a lessee of a new motor vehicle having such a nonconformity that has not been repaired after reasonable attempts can demand that the manufacturer

> 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 interests 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.

§ 218.0171(2)(b)3.a. For a lessee to receive such a refund, the lessee

> 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.

§ 218.0171(2)(cm)1. Once the lessee receives the refund, no person may enforce the lease against the lessee. § 218.0171(2)(cm)3. For the vehicle lessor to receive its refund, the lessor must offer to transfer title to the manufacturer. Within thirty days of that offer, the manufacturer must provide the refund to the lessor, at which time the lessor must transfer title to the manufacturer. § 218.0171(2)(cm)2.

If a manufacturer does not provide the refund within the thirty-day time period after a proper demand, it violates the lemon law statute. *Varda v. Gen. Motors Corp.*, 2001 WI App 89, ¶ 40, 242 Wis. 2d 756, ¶ 40. When a manufacturer violates the lemon law statute,

> [i]n addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this

> section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

§ 218.0171(7).

It is under subsection (7) that Tammi sues Porsche. Thus, the question before the court is what constitutes "pecuniary loss" for a subsection (7) claim as the statute does not define "pecuniary loss." *See* § 218.0171(1).

Unlike the portions of the lemon law statute quoted above that differentiate between purchasers and lessees for the purpose of refund after the consumer provides a lemon law notice, subsection (7) does not differentiate between purchasers and lessees respecting pecuniary loss. Nor does it state what happens when the term of the car lease ends before the lawsuit authorized by subsection (7) is final or what happens to title of the car at the conclusion of a subsection (7) lawsuit.

The primary rule for interpretation of Wisconsin statutes is to discern legislative intent. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 979 (1996). This is derived by examining the language, scope, history, context, subject matter and purpose of the statute. *Id.* Remedial statutes are "liberally construed to suppress the mischief and advance the remedy that the statute intended to afford." *Id.*; *accord Garcia*, 2004 WI 93, ¶ 8, 273 Wis. 2d 612, ¶ 8.

For his pecuniary loss damages Tammi seeks(1) his monthly lease payments, (2) the amount he paid for the car at the end of the lease, (3) the cost of a tire rack and winter wheel package, (4) the cost of floor mats and a manual, and (5) the cost of his insurance premiums, as a matter of law. In response, Porsche contends that (1) Tammi must live with

the jury's award of $26,600.00, (2) if the court changes the jury award, Tammi is limited to his lease payments and cannot recover the purchase price of the car at the end of the lease, (3) any pecuniary loss damages should be offset against a reasonable allowance for Tammi's use of the car before he first reported the nonconformity, and (4) Tammi must return the car to Porsche. For discussion, Tammi's and Porsche's arguments are considered together to the extent they relate to each other.

FACTS

Tammi entered a thirty-six-month lease for a 2003 Porsche 911 Turbo Coupe on May 30, 2003. (Pl.'s Tr. Ex. 1, § 1.) *(Id.*, §§ 4, 8.H.) The lease called for payments totaling $68,884.60. *Id.*, § 4. Additionally, the lease allowed Tammi to purchase the car at the end of the lease term for $64,344.10. *Id.*, § 10.

Tammi chose to purchase the car prior to the end of the lease. At the time of purchase he had paid $57,458 under the lease ($1999.85 at the time of signing and twenty-nine monthly payments of $1912.35). (*See* Pl.'s Br. in Supp. of Mot. to Change Verdict at 1 (calculating amount paid under lease).) At the end of December 2005, he purchased the car for $75,621.88. (Trial. Ex. 53.)

A. Lease Payments and the Jury's Award

As noted above, one purpose of the lemon law is to provide an incentive for a manufacturer to put the purchaser or lessee of a new car back into the position the purchaser was in when the vehicle was acquired. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 977 (1996); *Church*, 221 Wis. 2d at 468. The thirty-day window for compliance is to ensure that the manufacturer acts in a timely manner. *Id.*

When a manufacturer violates the lemon law by refusing to provide a refund within thirty days, at the very least, "the consumer suffers pecuniary loss in the amount of the refund he or she should have received." *Church*, 221 Wis. 2d at 470. Such a holding makes sense. The consumer should not receive *less* than what would have been due as a refund just because the manufacturer was wrongful in refusing to pay the refund and has forced the consumer to file a lawsuit. Receipt of less than the refund under subsection (2)(b)3.a flies in the face of two purposes of the lemon law: putting the consumer back in the position he was in when the car was leased and doing so in a timely manner. Therefore, the court rejects Porsche's argument that the jury's verdict of $26,600.00 must stand because Tammi took a gamble by choosing to sue under subsection (7) for pecuniary loss rather than a refund under subsection (2)(b)3.a.

Also, it follows that Tammi is entitled to double what was due pursuant to subsection (2)(b)3.a, i.e., the amount paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use. "Collateral costs" mean "expenses incurred by a consumer in connection with the repair of a nonconformity." § 218.0171(1)(a).

The evidence is undisputed that Tammi either paid or was obligated to pay (because he purchased the car five months early) $69,327.10 in lease payments under the written lease. Notably, Porsche does not argue that Tammi is limited to the refund payable within thirty days of proper demand, i.e., an amount determined by multiplying the monthly lease payments by the number of months Tammi had paid as of the date he served his lemon law notice on Porsche. Tammi was obligated by the lease to pay U.S. Bank, as lessor, a minimum of $69,327.10, even though the vehicle was a lemon. Had Porsche paid Tammi and the lessor within thirty days as it was required, it would have paid Tammi less than $69,327.10

and U.S. Bank the then-current value of the lease. Tammi's lease would have terminated and the lessor could not have enforced it against him. *See* § 218.0171(2)(cm)3. But, that did not occur.

Tammi did not submit any evidence that he incurred any expenses other than perhaps mileage to reach a dealership to seek the repair of a nonconformity. Thus, he has not established any more than deminimus collateral costs to add to this amount. *See* § 218.0171(1)(a). For these reasons, Tammi is entitled to $69,327.10 as pecuniary loss, minus, perhaps, a reasonable allowance for use as set forth in subsection (2)(b)3.a. (The issue of a reasonable allowance will be discussed below.) As a result, the jury's verdict as to the amount of damages must stand.

B. Purchase Price of the Car

Tammi also seeks to recover the purchase price of the car at the end of the lease. Porsche submits that if the court chooses to alter the jury's verdict, Tammi is entitled to no more than lease payments.

As noted above, "pecuniary loss" is not defined in the lemon law statute and lease termination is not addressed. The parties have not presented any cases directly on point. Hence, it appears that the issue before this court is one of first impression this court is unable to certify to the Supreme Court of Wisconsin. Therefore, this court must predict how the Supreme Court of Wisconsin would interpret the lemon law and decide the issue itself.

The best indicator of the Supreme Court of Wisconsin's likely ruling is *Hughes*, in which that court addressed the meaning of "pecuniary loss" for the purchaser of a lemon who sues under subsection (7). In *Hughes*, Chrysler admitted that the car was a lemon, yet failed to respond with a refund or replacement prior to expiration of the time limits under the

lemon law. Chrysler contended that a buyer's pecuniary loss was limited to actual out-of-pocket expenses, such as the amount the buyer paid toward the loan for the vehicle, whereas *Hughes* argued that pecuniary loss included the full purchase price of the car, regardless of how much had been paid toward the purchase price at the time of the lemon law notice. 197 Wis. 2d at 979.

The Supreme Court of Wisconsin agreed with Hughes and held that the Wisconsin legislature intended to include the full purchase price of the car as pecuniary damages. *Id.* at 977, 979, 983. The court based its conclusion on three factors. First, including the full purchase price as pecuniary loss provided consumers with a remedy substantially better than those existing prior to enactment of the lemon law. *Id.* at 983-84. Second, doubling the full purchase price as damages would provide more incentive for manufacturers to resolve disputes quickly, without litigation, "by making it far more costly to delay." *Id.* at 984. Third, the possibility of double damages creates a recovery large enough to prompt consumers to bring lawsuits, counteracting the wealth and technical expertise of the manufacturers. *Id.* at 984-85.

Importantly, the *Hughes* court overruled *Nick v. Toyota Motor Sales U.S.A., Inc.*, 160 Wis. 2d 373 (Ct. App. 1991), in which the Wisconsin Court of Appeals had found that "pecuniary loss" included only the amount of the purchase price a consumer had actually paid, whether by down payment or loan payments. *Hughes*, 197 Wis. 2d at 985-86. The *Hughes* court noted the anomalous results *Nick* produced depending on whether a consumer financed the car purchase or paid cash. For instance, a consumer paying $20,000 in cash for a vehicle would recover $40,000 as doubled pecuniary loss, whereas a consumer who financed the purchase and had only made a $2,000 down payment would receive $4,000 as

doubled pecuniary loss. *Id.* at 985.[2] The latter purchaser would be in a weaker position with respect to the manufacturer and would not have the incentive to sue. The *Hughes* court found such a result "inconsistent with the legislative goal of encouraging manufacturers to deal promptly and fairly with all purchasers of new vehicles." *Id.* at 986.

Including the amount of the purchase price at the end of the lease as pecuniary loss, when the lessee has purchased the car at the end of the lease, comports with the statutory language of § 218.0171 as well as the *Hughes* decision. Subsection (2)(b)3.a sets forth the payments to be made when the manufacturer *complies* with the statute after a consumer makes a proper demand. If the manufacturer does not provide the refund within the thirty-day time period, it violates the statute, and the consumer can sue under subsection (7). *Hughes*, 197 Wis. 2d at 982; *see Varda*, 2001 WI App 89, ¶ 40. The structure of the statute indicates that subsection (7)'s "pecuniary loss" is something separate from the payments set forth in subsection (2)(b)3. Subsection (7) does not cross-reference subsection (2)(b)3, but instead uses a different term, suggesting a different measure of damages.

Importantly, the purpose of the statute is furthered by including the amount of the end-of-lease purchase price. Allowing a manufacturer to go back to pre-violation damages, for which the consumer is paid double only the amount of the lease payments, reduces the incentive for manufacturers to comply with the law promptly and eliminate the need for litigation. On the other hand, doubling the end-of-lease purchase price of the car as well as the lease payments encourages manufacturers to deal promptly and fairly with all

[2]The *Hughes* court observed that in this later case the secured creditor would receive the unpaid principal and any interest owed, but the amount owed the secured creditor would not be subject to doubling. *Id.* at 985.

lessees of new vehicles, no matter how long or short a lease may be. In addition, the possibility of larger pecuniary loss damages gives lessees more incentive to sue.

Further, the history of § 218.0171 suggests that the end-of-lease purchase price should be included when a lessee purchases the car at the end of the lease. Initially, the lemon law covered only purchased vehicles. *See* 1983 Wis. Act 48. The Wisconsin legislature amended it later to include leased vehicles, *see* 1987 Wis. Act 105, and subsection (2)(b)3 now parallels for lessees and lessors the provisions relating to refunds to purchasers and lenders in subsection (2)(b)2.[3] Allowing a lessee who purchases the car at the end of the lease to recover the full purchase price as pecuniary loss comports with the addition of lessees to the statute. Moreover, it avoids anomalous results similar to those firmly rejected by the *Hughes* court. Also, the rule advocated by Porsche would produce anomalous results depending on whether a consumer finances a car purchase or leases the car and buys it at the end of the lease. Using the *Hughes* court's example as a guide, this court notes that a purchaser of a $20,000 car, even if financed rather than purchased with cash, would receive double pecuniary loss of $40,000 under *Hughes*. However, a lessee of a $20,000 vehicle who leases the car for a term of years and pays $10,000 in lease payments and then buys the vehicle at the end of the lease for another $10,000 would receive only $20,000 in double pecuniary loss. As in *Hughes*, such a result is inconsistent with the legislative goal of encouraging manufacturers to deal promptly and fairly with all lessees as well as purchasers of automobiles.

---

[3]Had Porsche provided Tammi with his refund within thirty days of the lemon law notice, it would have paid about the same amount whether the car had been purchased or leased; the difference would have been how the money was divided. *Compare* § 218.0171(2)(b)2.b. *with* (2)(b)3.a-c.

Further, in the example described by the *Hughes* court, even under the overruled *Nick* case, when a purchaser of a vehicle had paid only $2,000 toward a $20,000 car, the secured creditor of the car would have to be paid the remaining principal and interest owed (even though under *Nick* that amount would not be subject to doubling). *Hughes*, 197 Wis. 2d at 185. Subsection (7) states nothing about payments to secured creditors, yet the *Hughes* court indicated that such payment should be made. Similarly, notwithstanding the lack of specificity in subsection (7) regarding payments to lessors, a manufacturer should not receive a windfall through its violation of the lemon law by owing damages only to the lessee of an unexpired lease. Like the secured creditor mentioned by the *Hughes* court, the lessor would be owed the value of the car and the amount of the unpaid lease. And if a manufacturer would be forced to pay the lessor during the term of the lease, it should not receive a windfall because the lease has ended through the purchase of the vehicle by the lessee or by the return of the car to the lessor.[4] Again, anomalous results are avoided if vehicle purchasers and lessees are treated similarly. Using the *Hughes* example as a guide again, why should Porsche pay a purchaser of a $20,000 car $40,000 in double damages, when it would pay a lessee owing $10,000 in lease payments $20,000 as double damages and the lessor either nothing or just $10,000?

Porsche admitted at oral argument that if the lease had not expired at the time the car was determined to be a lemon, it would have owed U.S. Bank the value of the lease. This court does not see why Tammi does not step into the shoes of U.S. Bank. Porsche maintains that when Tammi purchased the car he ceased to be a consumer under the lemon

---

[4]In either of these examples, the party in possession of the vehicle would be saddled with a legally tainted vehicle.

law, as the lemon law covers only purchasers of new cars. However, the cases cited by Porsche, *Varda* and *Smyser v. Western Star Trucks Corp.*, 2001 WI App 180, 247 Wis. 2d 281, are distinguishable. In those cases, the individual had ceased to be a consumer prior to making even the lemon law demand on the manufacturer. Here, Tammi was a consumer at the time he made the lemon law demand and at the time he filed this lawsuit.

Further, while Porsche's argument has an initial appeal, it flies in the face of the purposes underlying the lemon law. Litigation takes time. Porsche's position rewards the manufacturer who violates the lemon law and drags out litigation[5] until a plaintiff's lease has ended. Further, it creates no uniformity, as leases may be made for twelve, twenty-four, or thirty-six months, for instance. In *Varda*, the Wisconsin Court of Appeals indicated that if a manufacturer does not provide a required refund to a consumer within thirty days, the lemon law statute is violated and "[t]he subsequent lapse of time that occurs during resort to a dispute settlement procedure and the filing of a court action under subsec. (7) does not alter the fact that a violation of the statute occurred." 2001 WI App 89, ¶ 40, 242 Wis. 2d 756, ¶ 40 (citation omitted). Hence, the lapse of time should not act to Tammi's detriment.

Additionally, Porsche's position fails to put the lessee back into the position the lessee was in at the time the car was leased. When Tammi leased his car he had a contractual right to purchase the vehicle at the end of the lease. Porsche's position would lead to a lessee either forgoing the right to purchase the car or purchasing a lemon rather than the quality car he expected at the time the lease was signed. Further, not compensating

[5]The court does not suggest that Porsche dragged out the litigation here. This case was not filed until late 2004, and the court places no blame on Porsche for the length of time proceedings in this court have taken.

a lessee for the loss of the value of his option to purchase fails to return him to the position he or she was in at the time the vehicle was leased.

In *Estate of Riley v. Ford Motor Co.*, 2001 WI App 234, ¶ 10, 248 Wis. 2d 193, ¶ 10, the Wisconsin Court of Appeals held that a lessee (whose lease appears to have still been in effect) was *not* entitled to the current value of the written lease or the termination value of the lease as a pecuniary loss. But the court's reasoning appears incorrect. First and foremost, *Riley* ignores *Hughes* except as authority for under taking de novo review to resolve a question of statutory authority. *Id.* at ¶ 7. Moreover, the Wisconsin Court of Appeals does not discuss why the cases of a purchaser and lessee should not parallel each other. Second, the court says that a consumer has an *option* to demand a refund or to sue under § 218.0171(7). 2001 WI App 234, ¶¶ 11-12. This court believes that subsections (2)(b)3 and (7) are not alternatives, but sequential steps; i.e., only when the manufacturer refuses to refund the money or replace the vehicle under subsection (2) does a "violation" occur, triggering subsection (7). *Hughes* says so. 197 Wis. 2d at 982 ("The Wisconsin lemon law is violated when the manufacturer fails to voluntarily replace or repurchase the lemon vehicle within 30 days after receipt of the consumer's . . . demand. This failure to voluntarily comply with the lemon law establishes a violation of the law and triggers the § [218.0171(7)] remedies of the law."). Third, the *Riley* court says that when a consumer chooses subsection (7), he "is limited to the remedies" in that section, which does not mention the current value of the written lease. *Id.* ¶ 12. But subsection (7) is not a limitation at all – it is a double damages provision meant to persuade manufacturers to issue the refund or provide a replacement rather than litigate. *See Hughes*, 197 Wis. 2d at 984 (discussing how double damages make manufacturers carefully consider whether they will refuse to comply with the statute). The

Hughes court did not seem to consider subsection (7) to be a limitation on damages. Therefore, this court does not believe that *Riley* is an accurate predictor of how the Supreme Court of Wisconsin would decide the present issue.

Federal courts sitting in diversity generally hesitate to expand state law in the absence of any indication of intent by the state courts or legislature. But here, the Wisconsin legislature and the Wisconsin Supreme Court, the state's highest court, have emphasized the protective nature of the lemon law for consumers. *Hughes* suggests the expansion of the double damages provision in favor of consumers and places emphasis on deterring manufacturers who violate the thirty-day refund or replacement requirements of the lemon law. Further, the Wisconsin courts have indicated that the lemon law is a remedial statute and that remedial statutes are construed liberally.

For all of these reasons, the purchase price of the car at the end of the lease is included in "pecuniary loss" under § 281.0171(7).

C. Accessories and Insurance

The Supreme Court of Wisconsin in *Hughes* held that for a purchaser of a vehicle, "pecuniary loss" includes the full purchase price of the vehicle. The court of appeals decision in that same case had indicated that pecuniary loss also includes payments of interest on the loan to finance the purchase, sales tax, and point-of-sale and collateral costs. *Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1, 13-14 (Ct. App. 1994). Those items were not challenged in the higher court.

In *Kiss v. General Motors Corp.*, the plaintiff had purchased a tow truck, which at the time of purchase included a towing packing manufactured by a third party but installed by the dealer. 2001 WI App 122, ¶ 3, 246 Wis. 2d 364, ¶ 3. In determining what constituted

a comparable replacement vehicle, the Wisconsin Court of Appeals found that such a vehicle included a new towing package; the manufacturer could not transfer the old towing packing to a new tow truck, but had to replace the towing packing with a new one as well. *Id.* ¶¶ 1, 10-17. The court noted that had Kiss elected a refund rather than replacement, he should have received an amount including the amount paid at the point of sale. *Id.* ¶ 16. According to the court, "the amount paid by the consumer at the point of sale is anything paid for by the consumer that day, including non manufacturer options paid for at the time of the sale whether installed prior to sale or after." *Id.* ¶ 16 n.5.

Under these cases, if a tire rack and winter tire and wheel package were items Tammi purchased at or near the time of delivery of the car, i.e., point-of-sale items, then they perhaps should be included in Tammi's pecuniary loss. The same is true for floor mats and a repair manual that Tammi purchased when he acquired his car. If Tammi had purchased the car rather than leasing, the cost of these items might have been included in the purchase price rather than priced separately.

However, a review of the exhibits in this case shows that none of these items should be included as pecuniary loss in the present case. Tammi leased the Porsche on May 30, 2003, from Zimbrick Inc. in Madison. Trial Ex. 1. On June 30, 2003, International Autos in Milwaukee invoiced Tammi, and Tammi paid, for the floor mats and manual. Trial Ex. 35. On December 12, 2003, Tammi purchased the winter tires and related accessories from The Tire Rack in South Bend, Indiana. Trial Ex. 38. None of these items was purchased point-of-sale on the date of the vehicle lease or within a few days of acquiring the vehicle. Although the floor mats and manual were purchased within a month, a line on what is "point-of-sale"

must be drawn somewhere, and one month falls on the wrong side of the line for Tammi. Certainly, tires purchased more than six months after the car was leased do not qualify.

Nevertheless, Tammi contends that these items were necessary only because he leased this car: but for his leasing of this particular car he would not have needed the floor mats, manual, or winter tires. However, none of these items was necessary for the car to function as intended. In particular, the winter tires must be outside the realm of "pecuniary loss." It appears that the car functioned without them for six months before purchase in Indiana, and the "but for" is really a different one: but for Tammi's living in Wisconsin or another state with snowy, winter weather, he would not have needed the winter tires.

Further, nothing indicates that Tammi would have had to turn the winter tires and tire rack over to Porsche had Porsche accepted his tender of the vehicle as a lemon. They were not nonremovable items which had to be turned over with the vehicle if Porsche had taken title to the car. They were not similar to the installed tow package in *Kiss*, which was to be returned to the manufacturer along with the tow truck.

As for insurance costs, Tammi's argument is that certain insurance was required by his lease and thus should be included as pecuniary loss like the lease payments. The court is unconvinced that insurance costs, which might have been incurred on any car Tammi drove – regardless of whether it was this particular car, whether it was leased or purchased, or whether it was a lemon – should be included as pecuniary loss. Although the lease payments and fees may be similar to the financing costs discussed by the Wisconsin Court of Appeals in its *Hughes* decision, insurance costs are different. Lenders of purchased cars could require insurance as well, yet the Wisconsin Court of Appeals did not include such costs in its discussion of pecuniary loss.

For these reasons, the accessories and insurance costs will not be included as pecuniary loss.

D. Offset for Reasonable Use Allowance and Return of the Car

Neither subsection (7) nor the Supreme Court of Wisconsin's *Hughes* decision discuss whether the manufacturer, either before or after the doubling of pecuniary loss, is entitled to a reduction for use of the vehicle or to a return of the car. For several reasons, this court finds that no allowance for use and no return of the car are required in this case.

First, subsection (7) by its terms states that the court "shall" award a consumer who prevails on a manufacturer's violation of the lemon law "twice the amount of any pecuniary loss." § 218.0171(7). If the court requires that Tammi return the car, Tammi does not receive double damages; instead, he receives double damages less the value of the car – here perhaps $65,000 or $70,000 less than double damages. Similarly, if the court offsets the double-damages award by an allowance for use, Tammi again receives less than double damages. But subsection (7) mandates that the court award twice the amount of pecuniary loss.

Porsche argues that allowing Tammi to keep the car "essentially amount[s] to triple as opposed to double damages." (Def.'s Br. in Supp. of Mots. after Verdict at 15.) But that is not true, as Tammi paid over $75,000 to purchase the car – even though it was a lemon. As Tammi paid for the car, his retaining it does not constitute triple damages.

Second, neither an allowance for use nor return of the car is mentioned in subsection (7), although both are specifically noted in subsections 218.0171(2)(b)3.a and (2)(cm)1. The absence of such language in subsection (7) can be interpreted as an intentional omission. The legislature knew how to provide for such a return and allowance

for use, and did so in subsection (2), but chose not to provide for a return and use allowance in subsection (7). Again, the language of subsection (7) supports a holding that the car does not have to be returned and that no allowance for use should be made.

Third, the text of subsection (2) supports a holding that return of the car is only required when the manufacturer complies with the lemon law by providing a refund or replacement car. Subsection (2)(c) states, regarding purchaser consumers, that "*[w]hen the manufacturer provides the new motor vehicle or refund*, the consumer shall return the motor vehicle having the nonconformity to the manufacturer and provide the manufacturer with the certificate of title and all endorsements necessary to transfer title to the manufacturer." § 218.0171(2)(c) (emphasis added). Subsection (2)(cm)1, regarding lessee consumers, states that "*[w]hen the manufacturer provides the refund*, the consumer shall return the motor vehicle having the nonconformity to the manufacturer." § 218.0171(2)(cm)1 (emphasis added). As stated above, the legislature's use of "pecuniary loss" in subsection (7) suggests that the remedy of double pecuniary loss is different from the remedies of refund or replacement. Here, Porsche has not, to date, provided any refund, and the damages award in this case is not equivalent to one. Thus, Porsche should not get title to the car.

Fourth, Porsche should not now be able to benefit from an offer that it previously rejected. In compliance with the lemon law, Tammi offered to return the car to Porsche under § 218.0171(2). At that time, Porsche said no to the return and to the refund, which would have taken into account an allowance for use as well. Porsche said that its position declining to provide a lemon law refund was "firm and final." Trial Ex. 17. Consequently, Porsche should not now, after violating the lemon law, be able to go back and accept the car or get its equivalent, when it previously rejected Tammi's offer.

Fifth, denying the manufacturer the return of the car furthers the purposes of the lemon law. As recognized by the Supreme Court of Wisconsin, the double damages provision provides an incentive for manufacturers to resolve disputes quickly, without litigation, by making it far more costly to delay. *Hughes*, 197 Wis. 2d at 984. The elimination of the allowance for use and return of the car for those manufacturers who violate the lemon law by refusing to refund money to a consumer purchaser or lessee comports with that incentive. A manufacturer who complies with the lemon law receives the car and an offset for use. A manufacturer who violates the lemon law by refusing to refund the consumer's money does not get those benefits. Denial of the return of the car and an allowance for use also comports with the legislature's intent to create a recovery large enough to prompt consumers to bring lawsuits, counteracting the wealth and technical expertise of the manufacturers. *See id.* at 984-85.

The purpose of the thirty-day window for compliance by the manufacturer is to ensure that the manufacturer refunds a purchaser's or lessee's money in a timely manner. *Church*, 221 Wis. 2d at 468. In discussing the thirty-day requirement for a manufacturer to comply with the lemon law, the Wisconsin Court of Appeals has acknowledged that the rigidity of the requirement

> places the manufacturer in a difficult position with attendant risk. However, the Lemon Law is a policy-driven statute aimed at the long-standing problems resulting from the unequal playing field between consumers and manufacturers. If its requirements prove to be too rigid and its results unreasonably harsh, it is a problem for the legislature, not this court, to resolve.

prospective future purchaser of this Porsche that a jury has found his vehicle to be a lemon under the Wisconsin lemon law.

CONCLUSION

As discussed above, the court finds that Tammi's pecuniary loss includes the amount of his lease payments and the amount of the buyout at the end of the lease but not the amounts for the accessories and insurance. Therefore,

IT IS ORDERED that the motion to change the verdict is granted. Thus, based on the record disclosing lease payments totaling $57,458.00 and a $75,621.88 purchase price for the car,

IT IS ORDERED that Tammi's pecuniary loss totals $133,079.88.

IT IS FURTHER ORDERED, pursuant to Wis. Stat. § 218.0171(7), that this pecuniary loss is doubled and that Tammi is entitled to a total award of $266,159.76, with no offset for use, and Tammi gets to keep the car.

IT IS FURTHER ORDERED that judgment be entered in Tammi's favor for $266,159.76, plus costs.

IT IS FURTHER ORDERED that Tammi inform any prospective purchaser of the 2003 Porsche 911 at issue in this case, VIN: WPAB29953S686671, that the car had a nonconformity that substantially impaired the car's use, value or safety and that the nonconformity continued after at least four repair attempts within the first year of use.

Dated at Milwaukee, Wisconsin, this 13th day of March, 2007.

BY THE COURT

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE

Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

BRUCE A. TAMMI,

Plaintiff,

v. Case No. 04-C-1059

PORSCHE CARS NORTH AMERICA, INC.,

Defendant.

This action came before the court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of plaintiff, Bruce A. Tammi, and against defendant, Porsche Cars North America, Inc., in the amount of $266,159.76, plus costs.

APPROVED:

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
U. S. District Judge

JON W. SANFILIPPO
Clerk

3/13/07
Date

s/ M. Jones
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRUCE A. TAMMI,

Plaintiff,

vs. Case No.: 04-C-1059

PORSCHE CARS NORTH AMERICA, INC.,

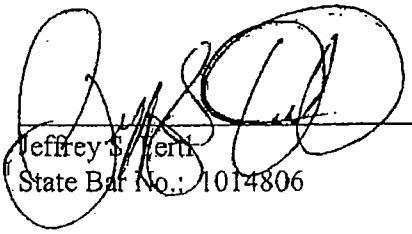
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, Porsche Cars North America, Inc., in the above-named case hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment and decision entered in this action on the 13th day of March, 2007 in the United States District Court for the Eastern District of Wisconsin.

Dated at Milwaukee, Wisconsin this 10th day of April, 2007.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant,
Porsche Cars North America, Inc.



Jeffrey S. Jerth
State Bar No.: 1014806

P.O. Address

100 East Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202-4115
414-276-6464

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

BRUCE A. TAMMI,

Plaintiff,

v. Case No. 04-C-1059

PORSCHE CARS NORTH AMERICA, INC.,

Defendant.

ORDER DENYING DEFENDANT'S RULE 50 AND 59 MOTIONS

For the reasons set forth on the record at a hearing held on November 2, 2006,

IT IS ORDERED that defendant's Rule 50 and 59 motions are denied.

The plaintiff's motion to change the verdict regarding the amount of damages remains under advisement.

Dated at Milwaukee, Wisconsin, this 3rd day of November, 2006.

BY THE COURT

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
U. S. District Judge

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

MAWDSLEY

BRUCE A. TAMMI
35000 Valley Road
Oconomowoc, WI 53066

CASE NO. 04CV2496

CASE CLASSIFICATION CODE: 30301
30303

Plaintiff,

-vs-

PORSCHE CARS NORTH AMERICA, INC.
4343 Commerce Ct. Suite 300
Lisle, IL 60532

THIS IS AN AUTHENTICATED COPY OF AN ORIGINAL DOCUMENT FILED IN THE CLERK OF COURTS OFFICE WAUKESHA COUNTY
OCT 14 2004
CLERK OF CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN

To each person named as defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 515 West Moreland Boulevard, Waukesha, Wisconsin 53188, and to Bruce A. Tammi, plaintiff, whose address is 405 East Lincoln Avenue, Milwaukee, Wisconsin 53207.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 14th day of October, 2004.

Bruce A. Tammi, plaintiff
State Bar No. 1016617
(414) 744-8120
405 East Lincoln Avenue
Milwaukee, WI 53207

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

BRUCE A. TAMMI
35000 Valley Road
Oconomowoc, WI 53066

Plaintiff,

-vs-

PORSCHE CARS NORTH AMERICA, INC.
4343 Commerce Ct. Suite 300
Lisle, IL 60532

CASE NO. 04CV2496

CASE CLASSIFICATION CODE: 30301
30303

AMOUNT CLAIMED IS GREATER THAN $5000

COMPLAINT

Plaintiff alleges as follows:

1) Plaintiff is an adult resident of Waukesha County, Wisconsin residing at 35000 Valley Road, Oconomowoc, Wisconsin 53066.

2) Defendant is a foreign corporation doing substantial business in the State of Wisconsin with a principal office address of 4343 Commerce Court, Suite 300, Lisle, Illinois 60532.

3) On May 30, 2003, plaintiff leased a new 2003 Porsche 996 Turbo, VIN WPOAB29953S686671 (hereinafter referred to as "Porsche") through Zimbrick Inc. Hyundai & European, an authorized dealer of the defendant.

4) The Porsche is a "motor vehicle" as defined by §218.0171(1)(d) Stats.

5) The defendant is the "manufacturer" of the Porsche as defined by §218.0171(1)(c) Stats.

6) The plaintiff is a "consumer" as defined by §218.0171(1)(b)4 Stats.

7) Zimbrick European of Madison, International Autos, and Concours Service, Inc. are "motor vehicle dealers" as defined by §219.0171(1)e Stats. as well as authorized motor vehicle dealers of defendant for warranty repairs of the Porsche.

8) A failure of the spoiler control of the Porsche and malfunction of the radio of the Porsche are both defects covered by the express warranty defendant provides for the Porsche.

9) A failure of the spoiler control of the Porsche and malfunction of the radio of the Porsche are both a "nonconformity" as defined by §218.0171(1)(f) Stats.

10) On March 2, 2004 plaintiff made the Porsche available to Concours Service Inc. for repair of a spoiler control failure and radio volume malfunction of the Porsche.

11) On March 16, 2004 plaintiff made the Porsche available to Concours Service Inc. for repair of a spoiler control failure and radio volume malfunction of the Porsche.

12) On April 22, 2004 plaintiff made the Porsche available to Concours Service Inc. for repair of a spoiler control failure of the Porsche.

13) On May 6, 2004 plaintiff made the Porsche available to Concours Service Inc. for repair of a spoiler control failure and radio volume malfunction of the Porsche.

14) On May 19, 2004 plaintiff made the Porsche available to International Autos for repair of a spoiler control failure and radio volume malfunction of the portion.

15) On May 21, 2004 plaintiff made the Porsche available to Zimbrick European of Madison for repair of a spoiler control failure of the Porsche.

16) On June 21, 2004 plaintiff made the Porsche available to Zimbrick European of Madison for repair of a spoiler control failure of the Porsche.

17) On August 13, 2004 plaintiff made the Porsche available to Zimbrick European of Madison for a spoiler control failure and radio volume malfunction of the Porsche.

18) On September 7, 2004 plaintiff mailed defendant a *Motor Vehicle Lemon Law Notice/Demand for Relief under §218.0171 Wisconsin Statutes* form demanding a refund calculated in accordance with the lemon law plus costs in exchange for plaintiff returning the Porsche and transferring its title to the defendant in accordance with §218.0171(2)(b)3. Stats.

19) Defendant has failed to provide plaintiff with the relief and refund requested and on October 6, 2004 mailed plaintiff a letter stating that defendant would not accept return of the Porsche.

20) US Bank is the "motor vehicle lessor" of the Porsche as defined by §218.0171(1)(em) Stats.

21) The lease agreement between plaintiff and US bank as lessor of the Porsche requires plaintiff to make lease payments to US Bank totaling $69,327.10 over the lease's three (3) year term.

22) The lease agreement for the Porsche also requires plaintiff to maintain the Porsche and maintain insurance covering the Porsche.

23) Following plaintiff's 9/7/04 lemon law refund request the defendant did not make an informal dispute settlement procedure available to plaintiff which is certified under §218.0171(4) Stats.

WHEREFORE, the plaintiff demands judgment for:

1) Relief pursuant to §218.0171(7) Stats. including but not limited to double plaintiff's lease payments for the Porsche ($138,654.20) plus double the plaintiff's costs for maintaining and insuring the Porsche during the term of its three (3) year lease.

2) Costs, disbursements, and reasonable attorney's fees pursuant to §218.0171(7) Stats.

3) Such other equitable relief as deemed just by the Court for defendant's failure to honor its warranty requirements and comply with the lemon law, §218.0171 Stats.

Dated this 14th day of October, 2004.

Bruce A. Tammi, plaintiff
State Bar No. 1016617
(414) 744-8120
405 East Lincoln Avenue
Milwaukee, WI 53207

ORIGINAL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

BRUCE A. TAMMI,

Plaintiff,

v. Case No. 04-C-1059

PORSCHE CARS NORTH AMERICA, INC.,

Defendant.

SPECIAL VERDICT

Question No. 1: During the first year after delivery of his 2003 Porsche, did plaintiff's vehicle have a nonconformity covered by the manufacturer's express warranty which substantially impaired the use, value or safety of his vehicle?

Answer: X Yes ____ No

IF YOU ANSWERED QUESTION NO. 1 "NO", STOP HERE. DO NOT ANSWER ANY OTHER QUESTIONS.

IF YOU ANSWERED QUESTION NO. 1 "YES", ANSWER QUESTION 2.

Question No. 2: Did plaintiff provide defendant or any of its authorized dealers with at least four attempts to repair the same warranty nonconformity within the first year after delivery of the vehicle and did the nonconformity continue?

Answer: X Yes ____ No

IF YOU ANSWERED QUESTION NO. 2 "NO", STOP HERE. DO NOT ANSWER ANY OTHER QUESTIONS.

IF YOU ANSWERED QUESTION NO. 2 "YES", ANSWER QUESTION 3.

Question No. 3: What amount of money will compensate plaintiff for any pecuniary loss caused by the continued non-conformity?

Answer: $26,600.00

8/24/06
Dated

Foreperson
DAVID HAMM

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1832

BRUCE A. TAMMI,

Plaintiff-Appellee,

v.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 04 C 1059—Charles N. Clevert, Jr., *Judge.*

ARGUED JANUARY 8, 2008—DECIDED AUGUST 4, 2008

Before FLAUM, RIPPLE, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Bruce Tammi filed suit against Porsche Cars North America, Inc. ("Porsche") in Wisconsin state court seeking damages for violations of the Wisconsin Lemon Law ("Lemon Law"), Wisconsin Statute Section 218.0171, involving the 2003 Porsche 911 Turbo he leased from US Bank. Porsche removed the case to federal court on the basis of diversity jurisdiction where the case proceeded to a jury trial. The jury entered a verdict in favor of Tammi and awarded him $26,600.00 in damages. The parties filed post-trial motions. The

district court denied Porsche's motion for judgment notwithstanding the verdict and granted Tammi's motion to alter the verdict on damages awarding Tammi $266,159.76. Porsche appeals. We affirm the jury's verdict on the sufficiency of the evidence. However, because Wisconsin law does not provide sufficient guidance on the important issue of pecuniary loss under its Lemon Law, we stay the remand of this appeal and certify four questions to the Wisconsin Supreme Court, pursuant to Circuit Rule 52 and Wisconsin Statute Section 821.01.

I.

On May 30, 2003, Bruce Tammi, a member of the Porsche Club of America, leased a 2003 Porsche 911 Turbo. Tammi's lease through US Bank was for a 36-month term and required an initial payment of $1,999.85 and 35 monthly payments of $1,912.35 (for a total amount of lease payments of $68,844.50). The lease provided a purchase option at the end of the lease for $64,344.10 plus taxes, and it imposed a $395.00 termination fee if the lessee elected not to purchase the vehicle.

Tammi testified at trial that he leased the vehicle for use in competitive car club events as well as for his work commute, which consisted primarily of highway driving. The car Tammi leased was equipped with a rear spoiler that was designed to deploy automatically when the vehicle exceeded 75 m.p.h. in order to provide aerodynamic stability to the car. The spoiler was designed to retract automatically at 40 m.p.h. While he did not experience any problems with the spoiler when participating in auto-cross competitions, Tammi testified that on occasion when he drove the car on the highway

between 55 m.p.h. and 70 m.p.h., the spoiler failed. Specifically, the spoiler would deploy, but would not retract. In addition, Tammi explained that when the spoiler failed, it prompted an audible chime to ring intermittently, a red warning light to illuminate, and a red warning message image to display in the center instrument cluster. Tammi stated that while he was able to temporarily stop the warning lights and sounds by stopping the vehicle, upon restarting the vehicle and returning to the highway, the warning would reappear and sound approximately every five minutes. Tammi found the warning light and the chimes startling and distracting. Tammi also complained that the car radio volume would blast upon start-up and then resume a normal volume after a few minutes. Tammi's wife also testified at trial that when she was driving the car no more than 65 m.p.h., the rear spoiler system failed causing her to pull off the highway, turn off the car, and call for assistance because she was unsure whether the car was safe to drive. Moreover, Tammi's wife stated that the warning lights and sounds continued after she restarted the car.

Tammi first took the car to Concours Service Inc. ("Concours"), a certified Porsche service provider, on March 2, 2004, noting that the rear spoiler failed to automatically retract and the radio volume was very loud when the car was first started. Between March 2004 and August 13, 2004, Tammi took the car to Concours, Zimbrick European of Madison, and International Autos at least eight times for service on the spoiler because of recurring failures without receiving a successful repair. Evidence of these service visits was presented at trial. At oral argument before this court, Porsche's attorney conceded that Tammi had taken his car in for repairs at least

four times. Tammi again experienced another spoiler failure after the August 13, 2004, service visit at Zimbrick.

On September 7, 2004, Tammi submitted to Porsche the required notice under the Wisconsin Lemon Law, Wisconsin Statute Section 218.0171. In that notice, Tammi indicated that his vehicle had been "made available for repair at least 4 times for the same defect during its first year of warranty," and demanded "[a] refund calculated in accordance with the Lemon Law, plus collateral costs." Tammi also listed the date, dealership, and problems reported for each service visit and indicated that the vehicle was leased from US Bank. Porsche responded with a letter dated October 6, 2004, rejecting Tammi's Lemon Law notice stating that it was its understanding that Tammi's vehicle had been repaired.

A little over a week later on October 14, 2004, Tammi filed a complaint in Wisconsin state court alleging a violation by Porsche of the Wisconsin Lemon Law, Wisconsin Statute Section 218.0171. Porsche removed the case to federal court, with the court having diversity jurisdiction over the case because Tammi was a citizen of Wisconsin, Porsche is a Delaware corporation with its principal place of business in Georgia, and the amount in controversy exceeded $75,000.

During the course of the lease, Tammi paid the $1,999.85 initial payment followed by 29 monthly payments of $1,912.35 (for a total of $55,458.15), some of which were paid after Tammi filed suit. As the litigation continued and before his lease expired, Tammi purchased the car in December 2005 with a final payment of $75,621.88, despite

the problems that persisted with the rear spoiler.[1] Essentially, Tammi bought a vehicle that he claimed was a lemon.

In August 2006, the case proceeded to a jury trial. Before the case was submitted to the jury, the district court held two hearings with Tammi, an attorney who was proceeding pro se, and Porsche's counsel, Jeffrey Fertl. During the course of these hearings, the parties argued about the proper scope of damages in this case. Tammi stated that he was seeking recovery of his lease payments ($57,458.00), the amount he paid for the purchase of the car under the buy-out option of the lease ($75,621.88), insurance ($2,457.85), winter tires ($2,044.11) and floor mats and an auto manual ($788.71), for a total of $138,370.55. In addition, Tammi sought to retain ownership of the car. Porsche asserted that the lease payments Tammi made were proper subjects of damage, but that the other items were not related to the vehicle repairs. The district court concluded that it was going to allow Tammi "to seek damages for the insurance and the like and reconsider after whatever verdict is returned." The parties stipulated that the mileage of the car as of the first service date was 6,576 miles.

The parties also discussed jury instructions and questions in the presence of the district court judge. The judge handed the parties a set of proposed instructions

---

[1] Tammi testified at trial that he inspected the car's electronic scheme and replaced the fuse for the spoiler. At the time of trial, Tammi had only experienced one spoiler failure after his repair. At oral argument before this court, Tammi confirmed that he had repaired the spoiler problem with only one subsequent failure.

and interrogatories, which they reviewed at that time. The first proposed jury question read: "During the first year after delivery of his 2003 Porsche, did the plaintiff have a nonconformity covered by the manufacturer's expressed warranty which substantially impaired the use, value or safety of his vehicle?" When the district court inquired of the parties regarding the acceptability of this question, Porsche's counsel responded that his only objection would be to the inclusion of all three terms ("use, value, or safety"), because he did not think the evidence supported the inclusion of all of these. Porsche continued, "[I]f the Court rules that there is sufficient evidence to submit use, value or safety to the jury, then the question is acceptable. I want to make certain for the record that I reserved or haven't waived my right to challenge the insufficiency of the evidence for any three of those." This first question remained unchanged, and the parties approved the remainder of the questions and instructions after additional discussion.

The case was submitted to the jury, which received instructions including instructions on the definition of nonconformity, the necessity for four repair attempts, and a general damages instruction. The jury returned a verdict in favor of Tammi concluding that the vehicle Tammi leased had a "nonconformity covered by the manufacturer's express warranty which substantially impaired the use, value or safety of his vehicle," and that Tammi had provided Porsche with at least four attempts to repair the nonconformity, which continued. The jury also awarded Tammi $26,600.00 for pecuniary loss resulting from the nonconformity.

In his post-trial motion, Tammi argued that rather than the general damages instruction it received, the jury should have received a specific Lemon Law damages

instruction. Porsche, in turn, filed a motion for judgment notwithstanding the verdict. The district court denied Porsche's motion, but granted Tammi's motion holding that as a matter of law Tammi was entitled to $266,159.76. Specifically, the district court concluded that Tammi was entitled to the $57,458.00 he paid in lease payments and the $75,621.88 purchase price he paid for the vehicle. The district court then doubled the sum of those two amounts as provided by Wisconsin Statute Section 218.0171(7) which provides for pecuniary loss to be doubled. The district court also concluded that Tammi was not entitled to the cost of the floor mats, winter tires, or insurance. Finally, the district court concluded that subsection 7 of the Lemon Law requires neither a reduction in pecuniary loss for use of the vehicle nor a return of the vehicle. Thus, the district court awarded Tammi $266,159.76 and retention of the car.

Porsche appeals, asserting that there was insufficient evidence for the jury to conclude that the vehicle had a nonconformity and that it violated the Lemon Law. In the alternative, Porsche requests a new trial on the issue of liability because it claims it was prejudiced when the district court submitted to the jury a question regarding substantial impairment of use, value, or safety when there was no credible evidence to establish all three items and the verdict was against the overwhelming weight of the evidence. Finally, Porsche also contends that the district court erred in calculating Tammi's damage award.

II.

Porsche argues that the district court erred when it denied its motion for a directed verdict before and after

the case was presented to the jury on the grounds that Tammi had failed to establish that there was a substantial impairment of his car's use, value, or safety. We review a district court's grant or denial of motion for judgment as a matter of law de novo. *Campbell v. Miller*, 499 F.3d 711, 716 (7th Cir. 2007). "Our inquiry is limited to the question whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Id.* (internal citations and quotations omitted).

Against this backdrop, we consider the standards for Lemon Law cases. The Lemon Law is triggered if a vehicle contains a nonconformity, that is, a "condition or defect which substantially impairs the use, value or safety of the motor vehicle, and is covered by an express warranty applicable to the motor vehicle." Wis. Stat. § 218.0171(1)(f). This impairment "must be more than a minor annoyance or inconvenience." Wisconsin Civil Jury Instruction 3301. However, a vehicle may possess a nonconformity even if the vehicle is drivable. *Dobratz Trucking & Excavating, Inc. v. Paccar, Inc.*, 647 N.W.2d 315, 320 (Wis. Ct. App. 2002) (citations omitted). Even vehicles with significant mileage have been found to possess nonconformities. *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 424 N.W.2d 747, 750-51 (Wis. Ct. App. 1988) (affirming a finding of nonconformity on a vehicle with 78,000 miles). Jury findings of nonconformities have been affirmed in cases where a dump truck's power steering would not work when the vehicle was stationary thereby impeding its ability to maneuver into tight spots at construction sites, *Dobratz Trucking*, 647 N.W.2d at 320-21,

where a vehicle continually pulled to the left, *Chmill*, 424 N.W.2d at 751, and where a malfunction in a truck caused the vehicle to be out of service for 49 days and its owner to have to turn down three to five jobs while the truck was in the shop, *Schonscheck v. Paccar, Inc.*, 661 N.W.2d 476, 482 (Wis. Ct. App. 2003).

Taking the evidence presented in this case in the light most favorable to Tammi, we conclude that there was sufficient evidence presented that the vehicle Tammi leased suffered a nonconformity that substantially impaired its use. Based on Tammi's testimony, the vehicle suffered a rear spoiler failure approximately every third time the car was driven. This failure was not limited to the spoiler not retracting, but prompted recurring audible chimes and flashing warning symbols on the dash. These lights and noises could only be stopped, or rather paused because the cessation was temporary, by pulling the vehicle off the highway, turning off the car, and restarting it. Porsche seems to make light of the repeated lights and sounds by noting that they did not constitute a substantial impairment because the warning could be reset by turning off the vehicle and removing the key. Tammi purchased the car for his work commute as well as for participation in car competitions. The jury could reasonably conclude that his use was substantially impaired when what would otherwise be a normal driving experience was punctuated by frequent chiming and flashing lights on his car's deck. Moreover, when the spoiler failed, Tammi's trips were interrupted because he had to stop the vehicle in order to put an end to a dinging, only to have the sound and flashing lights return once he resumed his trip. A purchaser of a brand new car, particularly a Porsche, would

not expect to encounter such disruptions every third time he drives that vehicle. In light of this evidence, we conclude that the evidence was sufficient for the jury to conclude that the rear spoiler failure constituted a substantial impairment of the use of the vehicle. Therefore, we affirm the district court's denial of Porsche's motion for judgment notwithstanding the verdict.[2]

In the alternative, Porsche requests a new trial arguing that it was prejudiced when the district court submitted to the jury "a question regarding substantial impairment of the use, value or safety when there was no credible evidence to establish all three items, as well as on the ground that the verdict was contrary to the clear weight of the evidence." In other words, Porsche contends that the evidence on the safety and value of the vehicle was insufficient for the district court to have submitted to the jury the question of substantial impairment on the theories of safety and value. Despite our conclusion that there was sufficient evidence for the jury to conclude that there was a substantial impairment based on use, we will address this alternate argument because Porsche asserts that a new trial is warranted because "the jury's verdict does not allow one to conclude whether any of

---

[2] Porsche also challenges the sufficiency of the evidence as to the substantial impairment of the value and safety to the vehicle resulting from the rear spoiler malfunction as well as the sufficiency of the evidence related to Tammi's claim that the radio malfunctioned. Because the statute only requires that there be a substantial impairment of either the use, value, *or* safety and we conclude that there was sufficient evidence to support the jury's finding of a nonconformity as it relates to use, we need not address these additional arguments.

these improper bases were considered by the jury [in entering its verdict]." We review a district court's decision whether to grant a new trial for an abuse of discretion and will only disturb that decision under exceptional circumstances. *David v. Caterpillar*, 324 F.3d 851, 863 (7th Cir. 2003). "A new trial may be granted if the verdict is against the clear weight of the evidence or the trial was unfair to the moving party." *Id.*

For the reasons discussed above, the jury's verdict in this case was not against the clear weight of the evidence regarding the substantial impairment of the use of the vehicle. Nor was the conduct of the trial unfair to Porsche. Porsche is correct that "a jury should not be instructed on a[n] [issue] for which there is so little evidentiary support that no rational jury could accept [it]." *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 621 (7th Cir. 2000). However, presentation of such issues in the jury instructions does not necessitate that a verdict be set aside. As we have previously noted, "[i]t cannot just be assumed that the jury must have been confused and therefore that the verdict is tainted, unreliable." *Id.* at 622. "This is just a case of surplusage, where the only danger is confusion, and reversal requires a showing that the jury probably was confused." *Id.* (citation omitted). Porsche does not assert that the jury was confused. Moreover, Porsche had the opportunity to argue for separate jury questions on each of the bases for nonconformity: value, safety, and use, as well as having each of these questions posed for both the spoiler and the radio. Porsche did not request such jury questions either at the hearing or in its proposed verdict form. Rather, when the jury instructions were being specifically discussed, Porsche only sought to preserve its sufficiency of the evidence

challenge and did not request an instruction other than the one that was actually posed to the jury. Had Porsche made such a request, it might have been able to demonstrate that the jury was confused if there was no evidence on an individual issue in which the jury found a nonconformity, but it cannot now claim it was prejudiced when all of the different types of nonconformity (i.e., use, value, or safety) were presented to the jury in the disjunctive in a single question. *Id.* at 622 (noting that if the appellant had asked the district judge to submit an interrogatory to the jury on the contested issue and the jury had checked the box in favor of the appellee, then the appellant "would then have had a solid basis for seeking a new trial."). In light of the evidence presented at trial and the lack of prejudice to Porsche, we conclude that the district court did not abuse its discretion in denying Porsche's motion for a new trial.

We now turn to the issue of damages. At trial, Tammi sought recovery of his lease payments ($57,458.00), the amount he paid to purchase the car ($75,621.88), the cost of insurance ($2,457.85), winter tires ($2,044.11), floor mats, and an auto manual ($788.71) for a total of $138,370.55. In addition, Tammi sought to retain the car. The district court granted Tammi his lease payments and purchase price, which it doubled in accordance with subsection (7) of the Lemon Law. The court also permitted Tammi to keep the car.

Porsche asserts that the district court's award of $266,159.76 in damages was in error. Obviously, it does not challenge the district court's rejection of Tammi's request for insurance, tire, floor mat, and manual costs. Porsche insists that Tammi is only entitled to the repayment of his lease payments with that amount being dou-

bled pursuant to subsection (7). Porsche and amici both contend that under subsection (7) a consumer is only entitled to recover damages "caused by a violation" of the Lemon Law. Their position is that when a lessee voluntarily purchases a vehicle after a lease expires, the purchase price paid is not a damage "caused by a violation" of the Lemon Law. Moreover, they assert that any loss suffered is self-inflicted. His voluntary purchase is, thus, "not a cost incurred by him as a result of any statutory violation." And even if he is entitled to that amount, Porsche claims it certainly should not be subject to the Lemon Law's doubling provision. Finally, Porsche asserts that it was error for the district court to permit Tammi to retain the car and not reduce the damage award by a reasonable allowance for Tammi's use of the car. Tammi responds that district court's damage award was in keeping with the Lemon Law's purpose of protecting consumers and that without the recovery of the amount he paid in purchasing the car, there would not be a sufficient motivation for Porsche to comply with the Lemon Law in future cases.

We review questions regarding the interpretation of statutes de novo. *United States v. Genendo Pharm., N.V.*, 485 F.3d 958, 962 (7th Cir. 2007). In Wisconsin, "[t]he cardinal rule of statutory interpretation . . . is to discern the intent of the legislature." *Hughes v. Chrysler Motor Corp.*, 542 N.W.2d 148, 149 (Wis. 1996) (internal quotation and citation omitted). The legislative intent is ascertained by reviewing the statutory language, history, subject matter, purpose, and scope. *Id.* In the case of remedial statutes, they "should be liberally construed to suppress the mischief and advance the remedy the statute intended to afford." *Id.* at 149-50.

The Wisconsin Lemon Law is a remedial statute through which the legislature intended to "improve auto manufacturers' quality control . . . [and] reduce the inconvenience, the expense, the frustration, the fear and [the] emotional trauma that lemon owners endure." *Hughes*, 542 N.W.2d at 151 (citation omitted). The principal motivation of the Lemon Law "is not to punish the manufacturer who, after all, would far prefer that no 'lemons' escape their line. Rather, it seeks to provide an incentive to that manufacturer to promptly return those unfortunate consumers back to where they thought they were when they first purchased that new automobile." *Id.* at 152-53.

The Lemon Law achieves this goal through the protection of consumers. A "consumer" under the Lemon Law includes a purchaser of a new motor vehicle, a person who can enforce a warranty, and "[a] person who leases a motor vehicle from a motor vehicle lessor under a written lease." Wis. Stat. § 218.0171(1)(b)(1), (3), & (4). If a consumer reports a nonconformity to the manufacturer and makes "the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be repaired." Wis. Stat. § 218.0171(2)(a).

If the nonconformity is not repaired after at least four tries or if the vehicle is out of service for at least thirty days due to nonconformities, the Lemon Law directs how the manufacturer is to proceed depending on the type of consumer involved. If the consumer is either a purchaser of a new motor vehicle or a person who may enforce a warranty, the manufacturer must do one of the following at the consumer's direction:

> Accept return of the motor vehicle and replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs.
>
> [or]
>
> Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motor vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the motor vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer.

Wis. Stat. § 218.0171(2)(b)2a & b.

If the consumer is a lessor, the manufacturer shall

> 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 interests 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.

Wis. Stat. § 218.0171(2)(b)3a. The statute goes on to define "current value of the written lease" as follows:

> [T]he current value of the written lease equals the total amount for which that lease obligates the consumer

> during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at the lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings.

Wis. Stat. § 218.0171(2)(b)3b.

The manufacturer has thirty days in which to provide a refund or replacement after the consumer presents it with the vehicle. Wis. Stat. § 218.0171(2)(c) & (cm). Failure to provide a refund is a violation of the Lemon Law. *Varda v. Gen. Motors Corp.*, 626 N.W.2d 346, 358 n.13 (Wis. Ct. App. 2001) (citing *Church v. Chrysler Corp.*, 585 N.W.2d 685 (Wis. Ct. App. 1998)). In the instance where the manufacturer neither repairs the nonconformity nor accepts return of the vehicle and gives a refund, the consumer is not without recourse because the Lemon Law also provides that,

> a consumer may bring an action to recover for any damages caused by a violation of this section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

Wis. Stat. § 218.0171(7). The statute does not define "pecuniary loss," which is the core issue in this case, though it is clear and undisputed that, whatever that amount might be, it is entitled to doubling under subsection (7).

Wisconsin law provides minimal guidance on what constitutes pecuniary loss. In the context of a consumer

who is a purchaser, the Wisconsin Supreme Court has held that pecuniary loss consists of the vehicle's full purchase price regardless of the amount the consumer actually paid. *Hughes*, 542 N.W.2d at 151-52. *Hughes* overturned the Wisconsin appellate court's earlier opinion, *Nick v. Toyota Motor Sales*, 466 N.W.2d 215 (Wis. Ct. App. 1991), which relied upon subsection (2)(b)2b of the Lemon Law to conclude that the pecuniary loss in the case of a new vehicle purchaser included the amount of the purchase price the consumer actually paid. Noting that *Nick* did not address the double damage disparity that would result depending on whether a consumer paid for the vehicle with his own money or with borrowed funds, *Hughes* concluded that

> [t]his result is inconsistent with the legislative goal of encouraging manufacturers to deal promptly and fairly with all purchasers of new vehicles. For that reason, any language in *Nick* contrary to our holding here that pecuniary loss includes the full purchase price of the vehicle to the consumer is overruled.

Hughes, 542 N.W.2d at 152.

In the context of a consumer who is a lessee, the Wisconsin Court of Appeals in *Estate of Riley v. Ford Motor Co.*, 635 N.W.2d 635 (Wis. Ct. App. 2001), vacated a trial court's award of pecuniary loss concluding that pecuniary loss does not include the current value of the written lease. The Wisconsin Court of Appeals noted that "[w]hen the consumer brings an action in court, he or she is limited to the remedies under § 218.015(7). This section does not

mention the current value of the written lease." *Id.* at 639.[3] The *Riley* court continued, "[t]he consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out of that money. The 'lessor' (and/or holder) owns a leased vehicle and, if it is a lemon, the lessor owns a lemon. When the consumer chooses a refund, he or she must return the vehicle to the manufacturer; therefore, the lessor does not have the vehicle and must be compensated for the value of the vehicle." *Id. Riley* did not address whether the scope of pecuniary loss is limited, as Porsche contends, to the lease payments or whether it encompasses the purchase price a lessee pays when exercising the purchase option under the lease.

Porsche argues that Tammi is not entitled to the purchase amount he paid and that pecuniary loss is limited to the relief provided in subsection (2)(b)3, noting that nowhere in the Lemon Law does it permit a lessee to recover the remaining value of the leased vehicle. In support of this position, Porsche cites *Varda v. General Motors Corporation*, 626 N.W. 2d 346 (Wis. Ct. App. 2001). In *Varda*, the plaintiff leased a vehicle in 1996 that began having brake problems that same year. Upon the lease's expiration in 1998, Varda purchased the vehicle pursuant to the lease terms. Then in 1999 after the purchase, Varda made a Lemon Law demand claiming the status of a consumer who is a lessee as described in subsection (1)(b)4. *Id.* at 349. The Wisconsin Court of

---

[3] The Lemon Law was renumbered in 1999 from Wisconsin Statute Section 218.015 to Section 218.0171, but the substance of the law was unchanged. *Kiss v. Gen. Motors Corp.*, 630 N.W.2d 742, 744 n.1 (Wis. Ct. App. 2001).

Appeals concluded that a person who purchases a vehicle at the conclusion of the lease and then attempts to invoke relief under subsection (2)(b)3 (the subsection directing how a manufacturer should respond to a lessee's Lemon Law demand after repairs are unsuccessful), "is no longer a consumer within the meaning of [§ 218.0171(1)(b)4]." *Id.* at 355. Despite Porsche's invocation, *Varda* is not on point because that case involved an individual who sought the relief that the Lemon Law affords lessees when that person was no longer a lessee. Porsche posits that "[a]t the time of purchase, Tammi was no longer a consumer under the statute who was entitled to recover the amounts paid to purchase the vehicle[, thus] he is only entitled to the relief that was available at the time he initiated the subject action." *Varda* still does not buttress Porsche's positions or resolve the question of what constitutes pecuniary loss because of the factual distinctions between it and Tammi's case. Tammi made his Lemon Law demand while still a lessee, and purchased his vehicle only after Porsche rejected his Lemon Law demand and after he sought relief under subsection (7).

Relying upon the requirement that a lessee return a vehicle when given a refund under subsection (2)(b)3a, Porsche asserts that Tammi is not allowed to keep the car and also recover double the amount of his pecuniary loss under subsection (7). Porsche also seeks a reduction in Tammi's damage recovery for reasonable use as provided in subsection (2)(b)2b when the consumer is a purchaser or one who can enforce a warranty. Wisconsin law, both case and statutory, is silent on these questions, and as such, guidance from the Wisconsin Supreme Court on how to resolve these issues would be most

helpful. Resolution of these issues and the others presented in this case about the scope of pecuniary loss implicates important policy considerations that inform the Wisconsin Lemon Law, and we believe that the Wisconsin Supreme Court is best suited to resolve them.

Pursuant to Circuit Rule 52:

> When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

The Wisconsin Supreme Court is permitted to answer certified questions from this court "which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of [Wisconsin]." Wis. Stat. § 821.01.

Certification is appropriate in a case which "concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 659 (7th Cir.

2008) (citation omitted). Other considerations are the interest the state supreme court has in the development of state law and "the likelihood that the result of the decision will almost exclusively impact citizens of that state." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). Certification is not appropriate, however, for decisions that are highly fact-specific and lack general significance. *Id.*

This case is well-suited for certification. We recognize the import of this decision on the sale of motor vehicles throughout Wisconsin for consumers and manufacturers alike. The submission of an amicus brief by various auto manufacturer associations and recreational vehicle manufacturers demonstrates the significance of this decision. The resolution of what constitutes pecuniary loss when the consumer is a lessee is of vital public concern to the citizens of Wisconsin and manufacturers whose vehicles those citizens purchase. While based on the specific lease and facts in this case, the damages sought are not unique in the context of an automobile lease and the issues that surround it are ones that will likely recur. Further, resolution of these questions by the Wisconsin Supreme Court will resolve this case and provide it "an opportunity to illuminate a clear path on the issue." Because the answers to these questions rely heavily upon the intent of the legislature and their policy considerations in enacting the Lemon Law, we conclude that the Wisconsin Supreme Court is "far more familiar with the policy choices that have been made, and have far more direct responsibility for the administration of justice within the state than do members of this court." *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 639 (7th Cir. 2002).

Accordingly, we respectfully certify the following questions to the Wisconsin Supreme Court on the issue of pecuniary loss under Wisconsin Statute Section 218.0171:

1. When a consumer defined in Wisconsin Statute Section 218.0171(1)(b)4 brings an action pursuant to subsection (7), if that consumer, after making his Lemon Law demand, then exercises an option to purchase and buys the vehicle as provided in the lease, is the consumer then entitled to recover the amount of the purchase price?

2. If the consumer defined in Wisconsin Statute Section 218.0171(1)(b)(4) is entitled to recover the vehicle purchase price when he exercises the purchase option provided in the lease, does the purchase amount qualify as pecuniary loss subject to the doubling provision in subsection (7)?

3. If the answers to questions 1 and 2 are in the affirmative, is the consumer permitted to keep the purchased vehicle in addition to the receipt of the damage award or must the vehicle be returned to the manufacturer?

4. Is a damage award under subsection (7) subject to a reduction for reasonable use of the vehicle?

To the extent that they think it necessary, we invite the Justices of the Wisconsin Supreme Court to reformulate these questions and expand their inquiry.

The Clerk of the Court is directed to transmit the briefs and appendices in this case as well as a copy of this opinion. The Clerk shall also transmit any part of the record that the Wisconsin Supreme Court might request, and we stay this matter in this court while the Wisconsin Supreme Court considers this matter.

AFFIRMED, in part; QUESTIONS CERTIFIED.

3300 LEMON LAW CLAIM: SPECIAL VERDICT

Question 1:

Did (plaintiff)'s vehicle have at least one nonconformity?

Answer:_____
Yes or No

If you answered question 1 "no," stop here. Do not answer any other questions.

If you answered question 1 "yes," answer questions 2 and 3.

Question 2:

Did the same nonconformity(ies) found to exist in question 1 continue to exist after the fourth time the vehicle was made available to (defendant) (or authorized dealers) for repairs?

Answer:_____
Yes or No

Question 3:

Was (plaintiff)'s vehicle out of service for an aggregate of at least 30 calendar days (within the term of the warranty) (within the first year after delivery) because of warranty nonconformity(ies)?

Answer:_____
Yes or No

If you answered either question 2 or 3 "yes," answer questions 4 and 5.

If you answered both question 2 and 3 "no," do not answer questions 4 and 5 and answer question 6.

Question 4:

A. What sum of money did (plaintiff) pay as the purchase price for the vehicle?

$_____

B. What amount of money did plaintiff pay for sales tax?

$_____

C. What sum was paid by (plaintiff) in finance charges to purchase the vehicle?

$_____

D. What sum will compensate (plaintiff) for collateral costs in connection with the repair of any nonconformity?

$_____

Question 5:

How many miles were on (plaintiff)'s vehicle when a nonconformity was first reported to (manufacturer or manufacturer's authorized dealer)?

_____ miles

Question 6:

Did (defendant) or its authorized dealers fail to repair any nonconformity in the (plaintiff)'s vehicle before the expiration (of the warranty) (of one year after delivery)?

Answer:_____
Yes or No

If you answered question 6 "yes," answer question 7.

Question 7:

What sum of money, if any, will fairly compensate (plaintiff) for any pecuniary loss?

$_____

COMMENT

This instruction and comment were approved by the Committee in 1999. The comment was revised in 2000, 2001, and 2005.

The special verdict covers two separate claims. Questions 1, 2, 3, 4, 5 deal with remedies established under Wis. Stat. § 218.0171(2)(b) — replacement or refund. Questions 1, 6, 7 deal with the remedy established under Wis. Stat. § 218.0171(2)(a). The distinction between the two claims is described in Vultaggio v. General Motors, 145 Wis.2d 874, 891, 429 N.W.2d 93 (1988).

Personal Injury. The Lemon Law does not permit a plaintiff's claim for personal injury damages. Gosse v. Navistar Int'l Transp. Corp., 2000 WI App 8, 232 Wis.2d 163, 605 N.W.2d 896. In Gosse, the court said that to allow recovery for personal injury damages would be contrary to the purpose of Wisconsin's Lemon Law. It said if a vehicle's construction is so defective that it causes injury to the consumer, the consumer can both pursue Lemon Law remedies to get the vehicle repaired, replaced, or to obtain a refund, and bring a separate claim for personal injuries under appropriate law. 2000 WI App 8, ¶ 14.

Good Faith. A consumer must act in good faith under the Lemon Law. Herzberg v. Ford Motor Co., 2001 WI App 65, ¶ 19, 242 Wis.2d 316, 626 N.W.2d 67. In Herzberg, the manufacturer argued that the "good faith" principles in the common law of contracts should be read into the Lemon Law. The court agreed but emphasized that this obligation is rooted in the Lemon Law itself, and not in any contract between the parties. Thus, the court held, under the facts of the case, the Lemon Law did not permit the manufacturer to make a conditional refund offer and, that the court could not rule the consumer acted in bad faith by rejecting that offer.

3304 LEMON LAW CLAIM: FAILURE TO REPAIR (RELATING TO SPECIAL VERDICT QUESTION 6) [WIS. STAT. § 218.0171(2)(a)]

If a new vehicle does not conform to an applicable express warranty, the consumer must report the nonconformity to the manufacturer or any of the manufacturer's authorized dealers (before the expiration of the warranty) (within one year after first delivery of the vehicle to the consumer.) The vehicle must also be made available for repair within one year after first delivery of the vehicle to the consumer.

Any nonconformity reported by the consumer and made available for repair, must be repaired by the manufacturer or its authorized dealers.

It is undisputed that (dealer) was a manufacturer's authorized dealer.

(Plaintiff) must prove that:

(a) the vehicle did not conform to an applicable express warranty, and

(b) that the nonconformity was reported to the manufacturer or its authorized dealer before (date), and

(c) that the vehicle was made available for repair[1] of the nonconformity on or before (date), and

(d) that the nonconformity was not repaired by the manufacturer or its authorized dealer, and

(e) that the nonconformity continues after expiration of (the warranty period) (one year).

COMMENT

This instruction and comment were approved in 1999. The statutory reference in the title was revised in 2005.

Vultaggio v. General Motors Corp., 145 Wis.2d 874, 429 N.W.2d 93 (Ct. App. 1988).

NOTE

[1]If only a Wis. Stat. § 218.0171(2)(a) claim, use Wis JI-Civil 3301 for definition of "nonconformity" and last paragraph of Wis JI Civil 3302 for definition of "available for repairs."

STATE OF WICONSIN
SUPREME COURT
APPEAL NO.: 2008AP001913-CQ

BRUCE A. TAMMI,

Plaintiff-Appellee,

vs.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant-Appellant

CERTIFIED QUESTIONS FROM SEVENTH CIRCUIT COURT OF APPEALS
APPEAL NO. 07-1832

PLAINTIFF-APPELLEE'S BRIEF ADDRESSING THE SEVENTH CIRCUIT'S CERTIFIED QUESTIONS AND APPENDIX

Bruce A. Tammi, Appellee
State Bar No. 1016617
405 East Lincoln Avenue
Milwaukee, Wisconsin 53207
414-744-8120

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

The Court accepted certification of the following questions of law from the United States Court of Appeals for the Seventh Circuit:

1. When a consumer defined in Wisconsin Statute Section 218.0171(1) (b)4 brings an action pursuant to subsection (7), if that consumer, after making his Lemon Law demand, then exercises an option to purchase and buys the vehicle as provided in the lease, is the consumer then entitled to recover the amount of the purchase price?

2. If the consumer defined in Wisconsin Statute Section 218.0171(1)(b)4 is entitled to recover the vehicle purchase price when he exercises the purchase option provided in the lease, does the purchase amount qualify as pecuniary loss subject to the doubling provision in subsection (7)?

3. If the answers to questions 1 and 2 are in the affirmative, is the consumer permitted to keep the purchased vehicle in addition to the receipt of the damage award or must the vehicle be returned to the manufacturer?

4. Is a damage award under subsection (7) subject to a reduction for reasonable use of the vehicle?

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication of the decision are necessary because the United States Court of Appeals for the Seventh Circuit believes resolution of what constitutes pecuniary loss when a consumer is a lessee is of vital public concern to the citizens of Wisconsin and manufacturers whose vehicles those citizens purchase.

STATEMENT OF CASE

The nature of this appeal's proceedings (certified questions of law) does not require a complete recitation of the facts and proceedings relative to this case.

This is a lemon law case in which appellant, Porsche Cars of North America, Inc. (hereafter Porsche Cars), has been adjudicated liable to appellee for pecuniary loss damages pursuant to sec. 218.0171(7) Stats. for failing to accept return of appellee's 2003 Porsche and make a refund as required by sec. 218.0171(2)(b)3. Stats.

The four (4) questions certified to this Court in essence all boil down to a single issue. The issue before the Court is given Porsche Cars' violation of the statute what damages for pecuniary loss is appellee entitled to under sec. 218.0171(7) Stats. as a consumer taking delivery of a new car under the terms of a closed end motor vehicle lease with an option to purchase?

The provisions of appellee's lease contract are relevant. Appellee's lease agreement is included in the record (Dkt. #51, Exh. 1) and appellee's accompanying appendix (Appellee's App. #1-4). On May 30, 2003, appellee entered into a *Motor vehicle Lease Agreement – Closed End* with Zimbrick Inc., the Porsche Cars dealership with whom appellee negotiated the transaction. As is common in such lease transactions, Zimbrick Inc. assigned its interest in the lease contract to US Bank who served as lesser through the term of the contract.

Sections 3 and 4 of the lease agreement required appellee to pay US Bank, as lessor, 36 monthly payments ($1999.85 at delivery and 35 monthly payments of $1912.35) totaling

$68.844.60. Section 5 of the contract required appellee to pay the lessor an additional $395.00 if he did not purchase the car.

Section 8 of the contract broke down how the monthly payment amount was calculated. The $1912.35 monthly payment was calculated by starting with the agreed upon value of the new car, $114,940.00 (price negotiated between appellee and Zimbrick Inc. for sale of the car). From the sales price of $114,948.00, an agreed upon residual value of the car (value at end of lease) was subtracted resulting in a depreciation amount for the car over the 36-month term of $50,945.90. To the $50,945.90 depreciation amount was added a rent (the finance) charge of $14,557.90 resulting in a total of $65,503.80 payable to the lessor over 36 months ($1819.55 per month). To $1819.55 paid lessor was added Wisconsin sales tax of $92.80 resulting in the $1912.35 per month payment.

Section 9 of the contract provided that in addition to monthly payments, appellee must pay $0.18 per mile for use of the car exceeding 25,000 miles per year.

Section 10 of the contract gave the appellee the option to purchase the car at the end of the lease term for $64,344.10 plus state sales tax and fees, provided appellee performed all obligations under the agreement and exercised the option at least 45 days before the end of the lease term.

Section 15 of the lease contract assesses certain additional charges against appellee for late payments.

Section 16 of the lease contract required appellee to obtain and pay for specified amounts of insurance on the vehicle.

Section 17 in addition to other obligations makes appellee responsible as lessee for "all necessary repairs" and "all costs of maintaining and servicing the vehicle."

Section 19 provides that if lessee does not purchase the vehicle, the lessee is responsible for the repair cost of a large laundry list of vehicle problems including "inoperative mechanical parts" and "electronic malfunctions." Appellee's lemon law complaint relates directly to such mechanical and electronic malfunctions.

Section 22 allows appellee as lessee to terminate the lease early by either exercise of the lease option to purchase or by giving

30 days written notice of same to lessor. If the option to purchase is not exercised, the lessee is subject to early termination charges.

Section 23 contains the contract's default provisions. In addition to typical default provisions relating to a failure by lessee to comply with contract obligations (make monthly payments, maintain insurance, etc.) the contract also makes it a default for lessee to become "incompetent," "insolvent" or "die". The lessor is given multiple remedies upon a default by lessee including the right to terminate the lease and take possession of the vehicle.

In addition to the motor vehicle lease agreement provision, the background of appellee's lease and purchase of the 2003 Porsche is relevant to the certified questions.

Appellee is a car enthusiast and hobbyist who acquired the subject 2003 Porsche 911 Turbo as a replacement for a 1999 Porsche Carrera and 1978 Porsche 911 Turbo he owned that were destroyed in a fire. Appellee typically financed all his expensive cars by way of lease contracts containing options to purchase. (Dkt. #87, pp. 118-119)

Appellee structured the lease of the 2003 Porsche to purchase it; and leased rather than initially purchase it outright for tax purposes. (Dkt. #87, pp. 167-171)

The 1999 Porsche Carrera that the 2003 Porsche Turbo replaced had been leased by appellee through the same Porsche dealership, Zimbrick Inc., with the lessor being Porsche Leasing LTD. The motor vehicle lease agreement for the 1999 Porsche Carrera was a two year lease containing an option to purchase which appellee exercised during the lease. (Dkt. #40, Exh. #3).

Prior to the lease and purchase of the 1999 Porsche, appellee had leased a 1996 Jaguar XJ6 from Jaguar Credit Corporation. The lease for the 1996 Jaguar had a two year term with an option to purchase which appellee also exercised during the term of the lease. (Dkt #40, Exh. #2)

Appellee also had leased a 2001 Dodge Viper with a three year term and option to purchase. The Dodge Viper was destroyed in same fire as the 1999 Porsche. The destruction of the 2001 Dodge Viper terminated the lease agreement pursuant to its default

provisions and appellee's insurer paid the lessor, US Bank, for the car and lease termination charges. (Dkt. #40, Exh. #4)

After appellee filed for Summary Judgment in this case, he made repairs to the 2003 Porsche which seemed to fix the problems with the car's rear spoiler and electrical systems that Porsche Cars had failed to fix. (Dkt. #87, pp. 156-159)

One year after appellee repaired the 2003 Porsche, he exercised the option to purchase the car. If appellee had not exercised his option to purchase the 2003 Porsche, the lease would have ended and possession of the car would have been given to the lessor, US Bank, prior to trial.

At trial the parties stipulated to US Bank records showing that plaintiff paid US Bank, as lessor, a total of $133,079.88 for the 2003 Porsche under the terms of the lease agreement. Plaintiff owned the 2003 Porsche at time of trial. The $133,079.88 paid US Bank consisted of a $1999.85 payment at the time the lease was signed; 29 monthly payments of $1912.35 (total = $55,458.15) and a final payment of $75,621.88 for purchase of the car. Plaintiff exercised the purchase option five (5) months before the end of the

lease's 36 month term. Had plaintiff not paid off the lease early and purchased the Porsche, plaintiff would have paid US Bank $9561.75 for the five (5) remaining monthly lease payments. Had appellee not exercised the purchase option he have also paid a $395.00 lease termination fee. (Dkt. #51, Exh. 53; Dkt. #87, pp. 173-174).

ARGUMENT

I. LEMON LAW STATUTORY CONSTRUCTION, HISTORY, AND BACKGROUND

A. Construction of Sec. 218.0171 Wisconsin Statutes

Wisconsin "lemon law" is contained in sec. 218.0171 Stats. The lemon law is a part of Chapter 218 Wisconsin Statutes which, in general, licenses and regulates finance companies (motor vehicle related dealers, adjustment companies, and collection agencies). Chapter 218 provides various remedies to consumers as well as penalties for violation of its regulatory requirements.

Sec. 218.0171 Stats. is aimed at the motor vehicle repair practices of motor vehicle manufacturers during the first year following the delivery of the motor vehicle to a consumer while under warranty. Subsection (1) of sec. 218.0171 Stats. contains

definitions applicable to the entire statute. The persons protected by the lemon law are "consumers."

Sec. 218.0171(1)(b) Stats. defines a consumer as:

> *(b) "Consumer" means any of the following:*
>
> *1. The purchaser of a new motor vehicle, if the motor vehicle was purchased from a motor vehicle dealer for purposes other than resale.*
>
> *2. A person to whom the motor vehicle is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the motor vehicle.*
>
> *3. A person who may enforce the warranty.*
>
> *4. A person who leases a motor vehicle from a motor vehicle lessor under a written lease.*

The new car/motor vehicle defects covered by the lemon law are referred to as a warranty "nonconformity." Sec. 218.0171(1)(f) Stats. defines a nonconformity as:

> *(f) "Nonconformity" means 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.*

Under the lemon law, motor vehicle manufacturers violate the statute if they fail to remedy or repair a nonconformity after the consumer has given the manufacturer a "reasonable attempt to repair" it.

Section 218.0171(1)(h) Stats. define such a "reasonable attempt to repair" a nonconformity as:

> *(h) "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.*
>
> *2. The motor vehicle is out of service for an aggregate of at least 30 days because of warranty nonconformities.*

Subsection (2) of sec. 218.0171 Stats. requires manufacturers to repair nonconformities occurring in new motor vehicles under warranty during the first year after delivery to a consumer. If such a nonconformity is not repaired after the motor manufacturer is given a reasonable attempt to repair it, the

motor vehicle manufacturer has a duty to accept return of the vehicle.

A consumer other than a lessee may direct the manufacturer to replace the defective vehicle with a "a comparable new vehicle."

All consumers may direct the manufacturer accept return of the defective vehicle in exchange for a refund.

Subsection (2)(b)2.b. imposes a duty on the manufacturer to make a refund as follows to a consumer classified as either "the purchaser of a new motor vehicle" or "a person to whom the motor vehicle was transferred for purposes other than sale" while under warranty or "a person who may enforce a warranty":

> *b. Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motor vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the motor vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer.*

Subsection (2)(b)3. imposes a duty on the manufacturer to make a refund as follows to a consumer classified as a lessee:

> *3.*
> *a. With respect to a consumer described in sub.(1)(b)4., 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.*
>
> *b. Under this subdivision, the current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at the lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings.*
>
> *c. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the consumer drove the motor vehicle before first reporting the nonconformity to the manufacturer, motor vehicle lessor or motor vehicle dealer.*

Subsection (2)(c) and (cm) establish the procedures required of a consumers to demand from a manufacturers a refund or replacement vehicle; along with the 30 day time limit and

procedures required of the manufacturer to comply with its obligation to accept return of a vehicle in exchange for a refund or replacement vehicle.

Subsection (2)(d) restricts the future sale of a vehicle returned under 3(b) as follows:

> *(d) No motor vehicle returned by a consumer or motor vehicle lessor in this state under par. (b), or by a consumer or motor vehicle lessor in another state under a similar law of that state, may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.*

There appears to be no penalty if a manufacturer violates this disclosure requirement.

Subsection (2)(c) and (f) provide a procedure for a manufacturer or a consumer other than a lessee to obtain refund of the sales tax paid for a vehicle returned to a manufacturer under (2)(b).

Subsection (3) of sec. 218.0171 Stats. provides:

> *(3) If there is available to the consumer an informal dispute settlement procedure which is certified under sub. (4), the consumer may not bring an action under sub. (7) unless he or she first resorts to that procedure.*

Subsection (4) of sec. 218.0171 Stats. sets standards for such certified informal settlement procedures.

Subsection (5) of sec. 218.0171 Stats provides:

> *(5) This section does not limit rights or remedies available to a consumer under any other laws.*

Subsection (6) of sec. 218.0171 Stats. provides:

> *(6) Any waiver by a consumer of rights under this section is void.*

If the manufacturer does not accept return of a consumer's mo tor vehicle in exchange for a refund or new replacement motor vehicle pursuant to subsection (2); and if alternative settlement procedures under sub (3) and (4) are unsuccessful or not made available, a consumers only recourse under the statute is to sue for double the consumer's pecuniary loss under Subsection (7).

Although an aggrieved consumer is allowed to resort to remedies available elsewhere (such as under the uniform commercial code or the federal Magnuson-Moss Warranty Act), the statute does not allow a consumer, for example, to sue a manufacturer for double damages in the form of two (2) replacement motor vehicles.

Section 218.0171(7) Stats. provides:

> *(7) 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. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

Section 218.0171 Stats. is a self-enforcing consumer protection statute and "consumers" are the only persons allowed to enforce the statute.

In order for the self-enforcing nature of the statute to work there must be a sufficient incentive for consumers to file suit and do battle with a motor vehicle manufacturer. The rewards of pursuing a lemon law case must outweigh years of uncertainty, the risk of loss, and the costs associated with it.

Conversely, the damages due a consumer for pecuniary loss damages in a subsection (7) action must be great enough to serve as an incentive for manufacturers, such as Porsche Cars, to comply with its duty to accept return of its defective cars pursuant to sec. 218.171(2) Stats.

It is clear, in this case, that whatever Porsche Cars believed was its exposure for damages under Subsection (7) was not a

sufficient incentive for it to accept return of appellee's 2003 Porsche in October of 2004 as required by the statute.

B. Legislative History Of Wisconsin's Lemon Law Statute Evidences The Intent To Treat Consumer Lessees And Purchasers Equally

The legislative history of Wisconsin's lemon law statute demonstrate the legislature's intent that consumer/lessees and consumer/purchasers of new motor vehicles be treated equally under the statute, and neither were to be subject to a "reasonable allowance for use" deduction in a subsection (7) action by a consumer for pecuniary loss damages.

Wisconsin's motor vehicle law was enacted in 1983 Wisconsin Act 48 which created Section 218.015 Wisconsin Statutes. (Appellees App. 5-6)

As originally enacted the definition of "consumer" did not include a motor vehicle lessee and the remedies of the lemon law statute were available only to a "purchaser of a new motor vehicle", "a person to whom the motor vehicle for purposes other than resale", or "a person who may enforce a warranty". Although "a person who may enforce a warranty" could be a motor vehicle

lessee, the statute did not specifically state that a lessee was such a consumer.

As with current sec. 218.0171 Stats., a manufacturer was required to replace a motor vehicle or refund the purchase price if the motor vehicle had a nonconformity not repaired after the manufacturer or any of its authorized dealers were given a reasonable chance to repair the vehicle. Unlike current sec. 218.0171(2)(b)2.b. Stats. the manufacturer was not obligated to include in its refund to a consumer any finance costs incurred by the consumer for the vehicle returned to the manufacturer. The manufacturer was also given a credit against the refund to the consumer for a "reasonable allowance for use" of the vehicle by the consumer. Unlike current sec. 218.0171 Stats., the definition of "reasonable allowance for use" was included in the general definition section at (1)(g) and the amount of such credit for use was not limited as is currently the case under sec. 218.0171(2)(b)2.b. and (2)(b)3.c. Stats.

The enforcement section of the lemon law statute (subsection 7) as originally drafted was also different and less clear as to the

damages a consumer was entitled to for a violation by a manufacturer of the lemon law return and refund/replacement provisions.

As originally drafted sec. 218.015(7) Stats. provided:

> *(7) In addition to any remedies, a consumer damaged by a violation of this section may bring an action for twice the amount of any pecuniary loss, together with costs and disbursements and reasonable attorney fees, and for equitable relief determined by the court.*

A difference between 1983 sec. 218.015(7) Stats. and current sec. 218.0171(7) Stats. is that it allowed but did not mandate a Court to award "twice the amount of any pecuniary loss" to a consumer damaged by a violation of the statute. Current sec. 218.0171(7) Stats. requires that "*The court shall award a consumer who prevails in such an action twice the amount of pecuniary loss ...*"

1985 Wisconsin Act 205 strengthened consumer rights under the lemon law and increased penalties to the manufacturer for violation of the statute. The statutory revision added finance charges paid by the consumer for a motor vehicle to the refund due from a manufacturer when a vehicle was returned for a

refund pursuant to sec. 218.015(2) Stats. (Appellees App. 7-8) Manufacturers became liable for the refund of not only the purchase price of a motor vehicle, but also for all finance charges paid by the consumer. In addition, the deduction for a reasonable allowance for use by the consumer for a vehicle returned to a manufacturer pursuant to sec. 218.015(2) was limited as is currently the case in sec. 218.0171(2)(b)2.b. and (2)b.3.c.Stats., and the definition of "reasonable allowance for use" was removed from the general definitions in subsection (1) to subsection (2) (return and refund procedure).

The enforcement provisions of sec. 218.015(7)Stats. for violation of the statutes were also strengthened requiring as with current sec. 218.0171(7) stats. that "*The court shall award a consumer who prevails in such an action twice the amount of pecuniary loss together with costs, disbursements and reasonable attorney's fees.*" As with current subsection (7) the revision mandated the Court to award twice the amount of pecuniary loss.

1987 Wisconsin Act 105 extended the remedies of the lemon law to lessees of motor vehicles. (Appellees App. 9-10) The Act

created sec. 218.015(2)(b)3. now present in current sec. 218.0171(2)(b)3. (sec. 218.015 Stats was renumbered 218.0171 in 1999) and amended the definition of "consumer" in subsection 1(b) to include 4. "*A person who leases a motor vehicle from a motor vehicle lessor under a written lease.*"

A consumer lessee whose motor vehicle had a nonconformity not repaired after a reasonable attempt to repair (4 service visits or 30 days out of service for the nonconformity) became entitled to the following relief under subsection (2)(b):

> *3.*
>
> *a. With respect to a consumer described in sub. (1)(b) 4., 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.*

After the revision, the rights of a consumer to a refund for a manufacturer's violation of the lemon law became essentially identical for consumers who either purchased or leased a motor vehicle.

Likewise a manufacturer's liability to lessees and purchasers under the statute was essentially the same under statute. Under subsection (2) a manufacturer must accept return of the motor vehicles for violation of the statute and pay back the consumer for what the consumer has paid for the vehicle(less a reasonable allowance for use) and pay the amount due any financial services company serving as lender or lessor.

C . Consumers Use More New Vehicle Leases

The leasing of new motor vehicles by consumer was a small but growing part of sales in the 1980's when Wisconsin's lemon law statute was enacted.

In the year 1990, 575,000 motor vehicles were leased by consumers in the United States. By 2007, the number of new motor vehicles leased by consumers in the United States increased 600% to 3,458,000. *RITA Bureau of Transportation and Statistics.* Table 1-17 New and Used Passenger Car Sales and Leases (Appellees App. 11-12)

In general terms, a lease is a contract for purchase of the use of property for a period of time from the owner of the property. A

purchase is a contract in which ownership of the property is purchased. A contract may also be both for use and purchase of property.

The financial services industry has devised increasingly complex financial arrangements for financing consumer transactions including those for lease of motor vehicles.

A review of appellee's lease for the subject 2003 Porsche demonstrates the complexity of such transactions and leases. Appellee's lease agreement was not simply a contract for appellee's use of the car, but also a contract for purchase of the car at any point and time during the three (3) year term of the contract.

Priced into appellee's lease contract and part of appellee's benefit of the bargain was appellee's right from the onset of the contract to both use and/or purchase the vehicle. While appellee was not required to purchase the 2003 Porsche, he paid for the right to do so.

II. WHEN A CONSUMER DEFINED IN WISCONSIN STATUTE 218.0171(1)(B)4 BRINGS AN ACTION PURSUANT TO SUBSECTION (7), IF THAT CONSUMER, AFTER MAKING HIS LEMON LAW DEMAND, THEN

EXERCISES AN OPTION TO PURCHASE AND BUYS THE VEHICLE AS PROVIDED IN THE LEASE, THE CONSUMER IS ENTITLED TO RECOVER THE AMOUNT OF THE PURCHASE PRICE AS PECUNIARY LOSS

A. Including The Purchase Price As Part Of A Lessee's Pecuniary Loss Treats Consumers Equally Whether They Finance Use And Ownership Of A Motor Vehicle By A Motor Vehicle Loan Or Lease

No consumer buying and financing a car or leasing a car with an option to purchase it does so with an eye toward making a lemon law claim. Whether a consumer buys or leases is above all a financial decision usually boiling down to the monthly payments the consumer is willing and able to make over the term of the loan or lease for the motor vehicle.

Appellee leased three (3) cars prior to the 2003 Porsche and bought each car pursuant to the purchase option of the respective lease. (Dkt. #40, Exhs. 2,3,&4) Appellee similarly negotiated his lease of the 2003 Porsche with the intent of purchasing it during the term of the lease; and financed the car through a lease contract rather than a loan for tax purposes. (Dkt. #87, pp. 167-171)

The legislative history of the lemon law statute evidences the legislature's intent that both lessees and purchasers be treated comparably.

The return and refund provisions of sec. 218.0171(2) Stats. return both purchasers (under (2)(b)2.) and lessees (under (2)(b)3.) to the same position.

If the consumer/purchaser paid cash for the vehicle, the consumer receives the entire refund. If the consumer/purchaser financed the purchase, the refund is divided between the consumer's lender (to pay off the loan) and the consumer (to reimburse his/her equity interest).

If the consumer is a lessee, the same refund is divided between the motor vehicle lessor (for amount due it for early termination of the lease and purchase of the car by the manufacturer) and lessee (for lease payments made).

In all instances, both purchaser and lessee consumers are returned to where they were prior to the transaction (less an allowance to the manufacturer for reasonable use) under subsection (2). The purchaser has the money paid for the vehicle

back and can purchase and finance another vehicle. The lessee has his lease payments back and may lease a new vehicle. If the consumer/lessee was using a lease to finance the purchase of a vehicle, he can do so again.

Who held title to the vehicle at the time of the refund matters little to the consumer because the vehicle is being returned to the manufacturer. The procedures for return and refund under subsection (2) for purchased vs. leased motor vehicles needs to be different, but only because the financer of the transaction has different interest. For motor vehicle loans, the bank typically secures its interest through a UCC lien against title. In a lease, the lessor/bank needs no lien because it has title to the vehicle.

There are no rational bases for penalizing consumers who finance the purchase of a new motor vehicle through a lease as opposed to those that finance the purchase through a loan after a manufacturer violates the statute forcing a consumer to sue the manufacturer for pecuniary loss damages under sec. 218.0171(7) Stats..

B. Wisconsin Case Law And Precedent Establish That Pecuniary Loss Damages In A Consumer's Action Under

Subsection (7) Includes The Purchase Price Of The Car And Therefore Appellee's Purchase Of The 2003 Porsche Under The Terms Of His Lease Agreement Should Be Part Of His Pecuniary Loss

As in this case, manufacturers such as Porsche Cars have been arguing that not everything paid by a consumer for a vehicle found a lemon should be included in pecuniary loss. The manufacturers temporarily won a round in 1991 when Wisconsin Court of Appeals agreed with them that pecuniary loss should not include the amount a consumer finances when purchasing a motor vehicle, but only the amount actually paid by the consumer. *Nick v. Toyota Motor Sales* Wis.2d373,466N.W.2d215(1991).

In 1996, the *Nick* decision was overruled by this Court in *Hughes v. Chrysler Motors Corp.*, 197 Wis.2d 973, 982, (1996) 542 N.W. 2d 148 when the court concluded that the Wisconsin legislature intended to include the purchase price of a car found to be a lemon as part of a consumer's pecuniary loss in an action under sec. 218.015(7) Wisconsin Statutes.

The court in *Hughes* rejected Chrysler's argument that pecuniary loss should be limited to buyer's out of pocket expenses and agreed with the plaintiff, Hughes, that *"allowing the*

consumer to recover double the purchase price of the automobile effectuates the purposes of the lemon law and strengthens the rights of consumers in dealing with vehicle defects."

The Wisconsin Supreme Court in *Hughes* gave three reasons for its decision overruling *Nick*:

"First, if we accept Chrysler's definition of pecuniary loss, then the remedy provided by the statute does not significantly improve upon those remedies available to the consumer before enactment of the law."

"Second, by including the purchase price of the car as part of pecuniary loss, the statute provides an incentive to the manufacturer to promptly resolve the matter by making it far more costly to delay."

"Third, a potential recovery must be large enough to give vehicle owners the incentive to bring suits against these corporations."

All the reasons given by the Court in *Hughes* for allowing everything paid by a consumer for purchase of a motor vehicle as

part of pecuniary loss is equally applicable in a lease case such as appellees.

Since the Wisconsin legislature has extended lemon law protection to consumers leasing motor vehicles to the same extent as provided to new car purchasers, it is consistent to treat them equally when a motor vehicle manufacturer breaches its duty under the lemon law and the consumer sues for pecuniary loss caused by the breach.

In this case had Porsche Cars in October, 2004 accepted appellee's offer to return the 2003 Porsche for a prorated refund pursuant to sec. 218.0171 (2)(b) Stats., it would have made little difference financially to Porsche Cars whether the car had been leased or bought by appellee. Porsche Cars would have refunded the same amount of money whether the 2003 Porsche was leased or purchased, the only difference being how the refund was divided (between lessee and lessor for a lease and between purchaser and lender for a purchase). One of the rationales given by the *Hughes* court for allowing a buyer to recover the full

purchase price of a vehicle was to serve as an incentive to promptly resolve lemon law claims.

If a consumer's purchase of a car as part of a lease is not part of pecuniary loss than there is little or no incentive for a manufacturer to voluntarily accept return of a car for a refund pursuant to sec. 218.0171(2)(b)3.Stats. because by rejecting the offer it limits its damages to the consumer's lease payments instead of the full purchase price of the car.

The only Wisconsin Court of Appeals' decision that specifically addresses the issue of the measure damages in a subsection (7) lemon law lease case such as this is *Estate of Riley v. Ford Motor Co.,* 248Wis.2d 193 635N.W. 2nd 635 (2004). Unfortunately, the decision in this case is short on facts. The Court of Appeals in this *Estate of Riley* never discloses the details of the subject lease, the point during or after the lease term the lemon law demand was made, whether all the payments of the lease were made, and whether the lease contained an option to purchase the vehicle and if so whether it was exercised or the car instead returned to the lessor. The estate of the lessee evidently prosecuted this lemon

law claim and therefore more likely than not the subject car was not purchased but instead returned to the lessor upon the death of Riley.

In fact most leases, including appellee's lease agreement for the 2003 Porsche, provide that death of the lessee is a default. (Appellee's App. 3-sec. 23A.(5) lease)

In the *Estate of Riley* case, the trial court held that the estate's damages under sec. 218.015(7) Stats. (now sec. 218.0171(7) Stats) included the "current value of the written lease." On appeal, the defendant, Ford, argued that the estate should only be allowed to recover the lease payments actually made (presumably prior to early termination because of lessee's death).

The court in *Estate of Riley* held that the estate could only recover what was paid under the lease and not the current value of the written lease. The Court held that *"the consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out that amount of money."*

Basically what *Riley* holds is that like the purchaser of a motor vehicle, a consumer leasing a motor vehicle is entitled to recover

as part of pecuniary loss what is actually paid for the motor vehicle. Appellee paid US Bank a total of $133,079.88 for the 2003 Porsche and consistent with both the *Hughes* and *Estate of Riley* decisions is entitled to recover the entire $133,079.88 as part of his pecuniary loss damages.

Appellant includes portions of other Wisconsin Court of Appeal's decisions including *Church v. Chrysler Corp.* 221Wis.2d460,585N.W.2d 685 (Ct. App. 1998) in support of its argument that only appellee's lease payments constitute pecuniary loss. The language in the *Church* case cited in appellant's brief was actually taken from the same court's decision in the *Nick* case. Again, the *Nick* case was overruled by the Wisconsin Supreme Court in the *Hughes* decision.

Further, *Church* was not a lease case and the issue before the court was not the measure of pecuniary loss in a subsection (7) lemon law case. In *Church v. Chrysler,* the manufacturer, Chrysler, claimed it properly accepted Church's offer to return the vehicle and refunded Church the proper amount pursuant to sec.

218.015(2)(c) Stats. The primary issue on appeal in *Church v. Chrysler* was whether or not Chrysler, in fact, had done so.

Porsche Cars also argues that appellee was not a "consumer" covered by the lemon law at the time he exercised the purchase option for the 2003 Porsche citing as authority *Varda v. General Motors Corp.,* 242Wis.2d756, 626N.W.2d346 (Ct. App. 2001). The issue in *Varda* was not the measure of pecuniary loss in a subsection (7) lemon law case. The issue in *Varda* was whether the lessee of a vehicle must give the manufacturer a subsection (2)(b)3. notice to return the vehicle for a refund before the lease ends.

In *Varda*, the lessee never gave a subsection (2)(b)3. lemon law notice to General Motors offering to return the vehicle in exchange for a refund before the end of the lease. The lease ended, Varda bought the truck, and some time thereafter made a subsection (2)(b)3. offer to return the truck for a prorated refund. The Court in *Varda* held that compliance with subsection (2)(b)3. is a mandatory prerequisite to a subsection (7) action for pecuniary

loss because once the lease ended the former lessee was not a "consumer" covered by the lemon law.

In this case, appellee during the term of the lease offered return of the 2003 Porsche to Porsche Cars allowing it to make a refund to appellee in exchange pursuant to subsection (2)(b)3. After Porsche Cars rejected return of the vehicle violating the statute, appellee fixed the car and exercised the purchase option before the lease ended.

C. Failure To Include The Amount Paid By Appellee For Purchase Of The 2003 Porsche Will Frustrate The Intent Of The Lemon Law And Serve As An Incentive For Motor Vehicle Manufacturers To Violate the Statute

If the purchase price paid for a motor vehicle pursuant to the excise of a lease option to purchase is not included in a subsection (7) action for pecuniary loss, there will be little incentive for manufacturer, such as Porsche Cars, to accept return vehicles for refunds in cases such as this. If Porsche Cars had accepted return of appellee's 2003 Porsche in October, 2004, it would have been required to refund appellee's lease payments and pay for the balance due the lessor for purchase of the car. If appellee's purchase of the Porsche is not pecuniary loss under subsection (7),

then Porsche Cars has, in effect, been rewarded for violating the lemon law and not accepting return of car because it saved a good portion of what would have been paid the lessor, US Bank, for purchase of the car.

What a manufacturer can save by rejecting a subsection (2)(b)3. lemon law claim will depend upon the terms of the particular lease contract. The smaller the lease payments relative to the purchase price, the greater the incentive will be for a manufacturer to reject a legitimate claim for refund by a motor vehicle lessee because rejecting the claim and violating the statute saves it the purchase price it would have paid the lessor.

Even in cases such as appellees, where his lease payments are very substantial, Porsche may be no worse off my rejecting a subsection (2)(b)3. claim.

As an example, at the time appellee exercised the lease purchase option for the 2003 Porsche, he paid US Bank $57,458.00 in lease payments and paid $75,621.88 for its purchase(total =$133,079.88). Porsche Cars appears to argue appellee's pecuniary loss at best should be $69,327.10 lease payments less $4,575.58 for

loss of use (total= $64,751.52). Even though pecuniary loss is doubled ($129,503.04), Porsche Cars is no worse off by rejecting a valid lemon law claim for a refund made pursuant to sec. 218.0171(2)(b)3.Stats. because it is out of pocket no more money than it would have been had it done its duty to accept return of the 2003 Porsche. Yes, there are other factors Porsche Cars might have considered in violating the statute including the cost of litigation; Porsche Cars' assessment of its odds at prevailing at trial; and the time value of the money Porsche Cars saves by not paying damages to appellee until after years of litigation. Of course, these same factors determine whether or not an aggrieved consumer/lessee will file suit for pecuniary loss under subsection (7).

The average consumer is far less able to sustain and endure years of protracted litigation than is a motor vehicle manufacturer. The average consumer will also not be leasing and/or buying a $120,000 Porsche. If a consumer/lessee is leasing a car for the more typical $300 or $400 per month, there is little incentive for the consumer to sue for pecuniary loss under

subsection (7) if all that may be recovered is double lease payments after years uncertain of litigation. As it is, few consumers will be anxious to litigate given their exposure to litigation expenses if they lose their case.

D. Denying A Lessee Consumer The Right To Recover The Purchase Price Of A Motor Vehicle As Pecuniary Loss Will Likely Damage Other Consumers Having No Recourse Or Remedy Under The Lemon Law

By fixing the 2003 Porsche himself and by exercising the car's offer to purchase, appellee has kept a defective vehicle from going to an unsuspecting consumer with no remedy or recourse under the lemon law.

If a consumer/lessee is not allowed to recover the purchase price of a leased vehicle under a lease purchase option, the average consumer will not purchase the vehicle. If appellee had not purchased the 2003 Porsche, the car would have been returned to the lessor, US Bank. Upon return of the 2003 Porsche to US Bank, it would have resold the Porsche with no notice to the subsequent buyer that the car was a lemon. As pointed out by Porsche Cars in its Brief, such a subsequent buyer is not covered by the lemon law.

In fact, lessees stuck with a lemon may well attempt to cut their losses and terminate the lease agreement early, paying the early termination fee and sticking the lessor and subsequent purchasers with the problem.

Schey v. Chrysler Corp. 228Wis.2d483,597N.W.2d457 (Ct. App 1999) illustrates the likely outcome in consumer/lessee lemon law cases if the lessee's purchase of the leased vehicle is not allowed as pecuniary loss in an action under sec. 218.0171(7) Stats. It will not be a big bank such as US Bank that gets stuck with the defective returned to it by a lessee, but instead by the person(s) subsequently purchasing it such as the plaintiff in *Schey.*

In *Schey*, a lessee returned a Dodge Neon (low priced compact car) after only six (6) months. Mr. Schey purchased the six (6) month old Dodge Neon and it proved to be a lemon. Mr. Schey filed suit for pecuniary loss damages under subsection (7) of the lemon law statute only to find he had no right or remedy under the lemon law as a subsequent purchaser of the vehicle.

III. THE CONSUMER DEFINED IN WISCONSIN STATUTE SECTION 218.0171(1)(B)(4) IS ENTITLED TO DOUBLE THE CONSUMER'S PECUNIARY LOSS UNDER SUBSECTION (7) INCLUDING DOUBLE THE AMOUNT

PAID FOR PURCHASE OF THE MOTOR VEHICLE PURSUANT TO THE LEASE PURCHASE OPTION

As appellant argues in its Brief, the lessor of a motor vehicle is not a "consumer" under the lemon statute able to commence an action pursuant to subsection (7) for pecuniary loss damages. Had Porsche Cars not violated the lemon law statute by refusing to accept return of appellee's 2003 Porsche, it would have paid US Bank (as lessor of the car) for the repurchase of the car.

Porsche Cars wants this Court to help it beat the system and reward it for violating the statute by holding it is no longer responsible for the purchase price of the vehicle.

Porsche Cars argues in its brief that *"moreover Tammi cannot establish that his voluntary purchase of the vehicle was caused by Porsche's violation of the statute."* This is not a tort action and what Porsche Cars caused appellee to do is not relevant to the issues of his damages. Porsche Cars' violation of the statute did not cause appellee to lease the 2003 Porsche. Does this lack of "cause" also mean appellee also has no claim for lease payments?

The issue is not what Porsche Cars' violation of the statute caused appellee to do or not to do. Instead the issue relates to

what Porsche Cars failed to do in violation of the lemon law statute; and how the failure deprived appellee of the right to both lease and purchase the warranted defect-free car bargained for when he entered into the lease agreement for the 2003 Porsche.

If indeed the purchase option was part of appellee's benefit of the bargain in leasing the Porsche, it was part of appellee's pecuniary loss caused by Porsche Cars' violation of the lemon law statute. The legislature clearly intended all pecuniary loss caused a consumer by violation of the statute to be doubled under subsection (7).

IV. A CONSUMER IS NOT REQUIRED TO RETURN THE MOTOR VEHICLE TO THE MANUFACTURER IF AWARDED PECUNIARY LOSS DAMAGES PURSUANT TO SECTION 218.0171(7) STATS.

A. Nothing In Sec. 218.0171 Stats. Conditions A Pecuniary Loss Recovery On The Consumer Purchasing The Vehicle

The only relief subsection (7) provides a consumer aggrieved by a manufacturer's violation of the lemon law statute is in the form of money (pecuniary loss) damages. There are no rules of statutory construction that support grafting the requirements and

conditions for return of a vehicle under subsection (2)(c) or (2) (cm) to a consumer's action for pecuniary loss under subsection (7).

What Porsche Cars would have this Court do is redraft the statute and add provisions from one distinct subsection of the statute to those of another.

What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will 21A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* (7th ed. 2007) Section 46.3. Each word in a statute is given effect and it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose. **Id** at Section 46.6

In construing a statute, it is always safe not to add or subtract from the language of a statute unless imperatively required to make it rational. **Id** at section 47.38.

What Porsche Cars argues is that this Court should construe a consumer's action for damages under subsection (7), as in essence, an action to enforce the return and refund provisions of subsection (2).

The legislature could have easily redrafted subsection (7) to accomplish what Porsche Cars wants.

Subsection (7) of sec. 218.0171 Stats. makes no reference back to subsection (2) and provides:

(7) 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. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

If the legislature had intended the refund and return scheme of subsection (2) to apply to subsection (7) action for damages, then it could have easily redrafted the section as follows:

> *In addition to pursuing any other remedy, a consumer may bring action to recover for any damages caused by a violation of this section.* ***If the consumer prevails in such an action, the court shall order the manufacturer to accept return of the vehicle and award the consumer as pecuniary loss twice the refund as calculated pursuant to preceding subsection (2),*** *together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.*

Since the legislature did not so draft the statute, it must be presumed that it did not intend the construction argued for by Porsche Cars.

B. Return Of The Vehicle To The Manufacturer Does Not Further The Purpose Of The Statute

Had Porsche Cars been concerned about protecting the public from defects in appellee's 2003 Porsche, it could have easily done so by accepting return of appellee's 2003 Porsche when appellee offered to return it for a refund in October, 2004.

Unlike asserted by Porsche Cars, there is nothing in the statute that would require Porsche Cars or any other manufacturer to disclose the "lemon status" or "brand the title" if it were returned in a subsection (7) action. The disclosure provision in subsection (2)(d) by its terms is limited to *"a motor vehicle returned by a consumer or motor vehicle lessor in this state under par. (b)"* of subsection (2). There are no cross references between subsection (2)(d) and subsection (7) that would require Porsche Cars or any other manufacturer to disclose the "lemon status" or "brand the title" if a vehicle were returned in a subsection (7) action.

In addition, the disclosure provisions of subsection (2)(d) is a guard dog without teeth. There are no penalties for a manufacturer failing to make the required disclosures for a

returned motor vehicle and no apparent procedure to enforce compliance.

It is just as likely that a consumer subsequently purchasing the 2003 Porsche from appellee would be given knowledge of its "lemon" status as from Porsche Cars.

At least in this case, it would probably be easier to discover the history of the 2003 Porsche if a consumer purchased it from appellee. All a potential purchase would need to do is Google appellee's name on the internet which would result to direct links to the Seventh Circuit's Decision in this case as well as numerous articles in periodicals and commentaries relating to the case.

C. A Return Of The Motor Vehicle Requirement Will Create Another Potential Loophole For Manufacturers To Litigate

If somehow a motor vehicle needs to be returned to a manufacturer when awarded pecuniary loss damages under subsection (7), then this Court needs to establish a comprehensive procedure for doing so. If a comprehensive procedure is not established, the return of vehicle requirement will become a source of litigation used by manufacturers against consumers.

If a manufacturer has the right to return of a vehicle, the Court needs to clarify how all this would work after judgment in a case including:

1) At what point and time would the consumer have to return the vehicle? Would it be returned upon judgment, after payment of the judgment or before payment of the judgment? How does execution of judgment work if the manufacturer does not pay it?

2) In what condition must the motor vehicle be in when returned to the manufacturer? What if the car has been damaged or in an accident or just used up after five to six (5-6) years of litigation? Can the manufacturer object to condition and if so what are the rights and remedies of the parties? How are disagreements handled-another trial?

3) What if the consumer needed trade or sell the car during litigation because the consumer needed a different car?

4) What if the motor vehicle were destroyed and therefore could not be returned? Appellee leased the 2003 Porsche to replace cars destroyed in a fire. One of the cars destroyed in the same fire was a new car appellee was leasing.

5) Does a consumer lose his claim for pecuniary loss damages under subsection (7) if he no longer owns or has possession of the subject motor vehicle? If not, how is the value of the lemon determined?

The argument can be made that all these casualty events could happen before a consumer can make an offer to a manufacturer to return a motor vehicle for a refund under subsection (2). A manufacturer would have no duty to make a refund to consumer under subsection (2) if the vehicle was not returned, but the reason would be because the consumer did not comply the consumer's duty under the statute.

After a consumer complies with the requirements of subsection (2) and a manufacturer violates the statute, the intent of the lemon law is not furthered by requiring the consumer to keep or maintain a motor vehicle for years and years of litigation. Such a "lemon" motor vehicle may be totally unreliable and unsuitable for the consumer's needs.

Many consumers can afford only one (1) motor vehicle and a requirement that they maintain the vehicle may make it

impossible for them to pursue a legitimate claim for pecuniary loss under subsection (7).

VI. THE DAMAGE AWARD UNDER SUBSECTION (7) IS NOT SUBJECT TO A REDUCTION FOR REASONABLE USE OF THE VEHICLE

A. Nothing In Section 219.017(7) Stats. Allows A Reduction Of A Consumer's Pecuniary Loss Damages By An Allowance For Reasonable Use

Nothing in subsection (7) makes reference to the reasonable allowance for use deduction in either a subsection (2)(b)2.b. (for purchasers) or subsection (2)(b)3.c. (for lessees). For the same reasons given in preceding Section IV A of this brief, adding provisions and language from a separate and distinct subsection of the statute to another is against general rules of statutory construction.

Appellant, Porsche Cars, refers to Wisconsin Civil Jury Instruction Number 3300 as authority for its argument that appellee's pecuniary loss damages must be reduced by an allowance for reasonable use.

The Wisconsin Civil Jury Instructions are valuable assistance to the Bar and Bench in formulating jury instructions. These

instructions are only guidelines and by their nature must be modified based upon the law and facts in the particular case being litigated.

A review of Instruction 3300 demonstrates that it is general in nature containing alternative instructions for various types of lemon law cases. Wis JI-Civil 3300 provides no damage instruction applicable to a lemon law lease case.

Perhaps after the Decision in this case, a proper jury instruction for damages in a subsection (7) consumer/lease case will be drafted by the Wisconsin Jury Instruction Committee.

An instruction regarding the allowance for reasonable use may be necessary to resolve an issue of a manufacturer's compliance with the statute when tendering a refund to a consumer, but not for reducing the pecuniary loss of a consumer in a subsection (7) action. A consumer and manufacturer could disagree as to the reasonable allowance for use due the manufacturer in making a refund to a consumer under subsection (2). If a manufacturer tendered a refund to a consumer under subsection (2), but the consumer claimed too much was deducted for a reasonable

allowance for use, the consumer could sue for damages under subsection (7) claiming the incorrect refund was tendered.

The manufacturer could raise as a defense that it tendered the proper refund; and an issue at trial would be whether the correct allowance for use was subtracted from the refund by manufacturer.

B. The Legislative History Of The Statute Demonstrates That The Legislature Did Not Intend a Consumer's Pecuniary Loss Under Subsection (7) To Be Reduced By An Allowance For Reasonable Use

As originally drafted the lemon law statute (then sec. 218.015 Stats.) contained the definition of *"reasonable allowance for use"* in subsection (1) the general definition section of the statute. (Appellee's App. 5)

1983 sec. 218.015(1)(g) provided:

> *(g) "Reasonable allowance for use" means an amount attributable to a consumer's use of a motor vehicle, but does not include any period after the consumer's first report to the manufacturer or any of its authorized motor vehicle dealers of a nonconformity with an express warranty applicable to the motor vehicle during which the motor vehicle is out of service due to the nonconformity.*

1985 Wisconsin Act 205 moved the definition of "reasonable allowance for use" from the subsection (1) definitions applicable to the entire statute to the subsection (2) return and refund section. (Appellee's App. 7)

1987 Wisconsin Act 105 extended the lemon law to motor vehicle lessors and incorporated the current "reasonable allowance for use" provisions of subsection (2)(b)3.c. in the Statute.

Section 218.0171(2)(b)3.c provides:

> *c. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the consumer drove the motor vehicle before first reporting the nonconformity to the manufacturer, motor vehicle lessor or motor vehicle dealer.*

Had the legislature continued to keep the definition and provisions for a "reasonable allowance for use" in the subsection (1) general definition section, it might be argued that the legislature intended it applicable to a subsection (7) action by a consumer for pecuniary loss damages.

That the legislature moved the definition to subsection (2) is evidence it intended the reasonable allowance for use deduction only applicable under subsection (2)

VI. SUMMARY

A. Who Wins And Loses by Limiting A Consumer's Pecuniary Loss Damage Claim And Does This Further the Intent Of The Statute?

Motor vehicle manufactures, of course, benefit if the pecuniary loss damages of a consumer/lessee are limited to lease payment obligations, but does this outcome further the purpose and intent of the lemon law statute?

Appellee submits that the outcome argued for by Porsche Cars will serve as an incentive for motor vehicle manufacturers in consumer/lease cases to violate the statute and a disincentive to consumer/lessees to pursue subsection (7) pecuniary loss claims for such violations.

If a consumer/lessee is not allowed to recover as pecuniary loss the amount paid for purchase of a vehicle pursuant to a lease option to purchase, the following will be the consequences:

1. Manufacturers will not accept return of vehicles for a refund under subsection (2)(b)3. because they save having to repurchase the car; and they may pay less in double pecuniary loss damages under subsection (7) then had they accepted return of the vehicle and refunded payments to the lessee and paid the lessor for the vehicle.

2. Consumer/lessees will be less likely to pursue a subsection (7) action for damages caused by a manufacturer's violation of the statute because the potential damages will not justify the uncertainty of litigation and risk of loss.

3. Consumer/lessees will be more likely to give possession of defective cars to lessors rather than keep possession of the car resulting in these cars being sold by the lessor to unsuspecting subsequent buyers with no recourse or remedy under the lemon law.

4. Consumers financing purchase of a motor vehicle are not cognizant of the lemon law and those using a lease with option to purchase will penalized if stuck with a lemon as opposed to if they had purchased with a loan.

5. The lessee loses part of his/her benefit of the bargain in negotiating a motor vehicle lease with option to purchase.

B. Return of the Motor Vehicle Is Not Required In Any Action By A Consumer Under Subsection (7) For Pecuniary Loss Damages

There is no legislative intent that a motor vehicle be returned in a subsection (7) action, and the appellants arguments to the contrary are not supported by the construction and language of the statute.

Furthermore, the legislature could not have intended to require a consumer stuck with a lemon to keep and maintain the vehicle indefinitely so it could be returned many years after the manufacturer rejected return of it and caused the consumer to litigate a subsection (7) action to conclusion.

Such a requirement for return of the vehicle would be fodder for additional delay and litigation by manufacturers as well as be unworkable in practice.

C. A Reasonable Use Allowance Is Not Deducted From a Consumer's Pecuniary Loss Damages Under Subsection (7)

The construction of the statute and fact the legislature moved the definition of "reasonable allowance for use" from the general

definitions in subsection (1) to the return and refund subsection (2) evidence an intent that a consumer's pecuniary loss damages under subsection (7) are not reduced by a reasonable allowance for use.

CONCLUSION

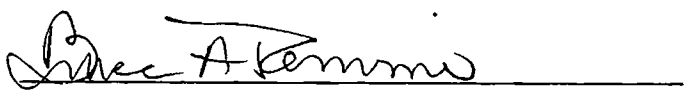
Appellee requests the Court to answer the certified questions as follows:

1. When a consumer defined in Wisconsin Statute Section 218.0171(1) (b)4 brings an action pursuant to subsection (7), if that consumer, after making his Lemon Law demand, then exercises an option to purchase and buys the vehicle as provided in the lease, is the consumer then entitled to recover the amount of the purchase price?
ANSWER: Yes

2. If the consumer defined in Wisconsin Statute Section 218.0171(1)(b)4 is entitled to recover the vehicle purchase price when he exercises the purchase option provided in the lease, does the purchase amount qualify as pecuniary loss subject to the doubling provision in subsection (7)?
ANSWER: Yes

3. If the answers to questions 1 and 2 are in the affirmative, is the consumer permitted to keep the purchased vehicle in addition to the receipt of the damage award or must the vehicle be returned to the manufacturer?
ANSWER: Yes

4. Is a damage award under subsection (7) subject to a reduction for reasonable use of the vehicle?
ANSWER: No

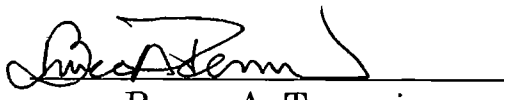


Bruce A. Tammi, Plaintiff-Appellee
State Bar No. 1016617
405 East Lincoln Avenue
Milwaukee, Wisconsin 53207
414-744-8120

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,722 words.

Dated this 3rd day of November, 2008.



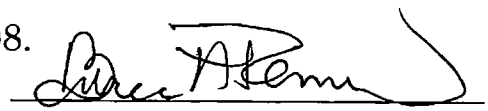
Bruce A. Tammi

APPELLEE'S APPENDIX CERTIFICATION

I hereby certify that filed with this brief as part of it is a supplemental appendix that complies with sec. 809.19(3)(b) Stats. and contains a Table of Contents.

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.

Dated this 3rd day of November 2008.



Bruce A. Tammi

SUPPLEMENTAL APPENDIX

MOTOR VEHICLE LEASE AGREEMENT - CLOSED-END - WISCONSIN

usbank
Five Star Service Guaranteed

1. LESSEE AND LESSOR

LESSEE AND CO-LESSEE	LESSOR
Name: BRUCE A TAMMI Address: 35000 VALLEY RD OCONOMOWOC WI 53066 County: MILWAUKEE	Name: Zimbrick Inc. Hyundai & European Address: 320 West Beltline Highway Madison WI 53713
LEASE NUMBER	**LEASE DATE** 5/30/03

The words "you" and "your" mean each person named as a Lessee or Co-Lessee above. The words "we," "us" and "our" mean the Lessor named above and USB Leasing LT or its successors and assigns ("Assignee"), to whom this Motor Vehicle Lease Agreement ("Lease") will be assigned. "Vehicle" means the leased vehicle described below, including all equipment, parts, accessories and accessions. You agree to lease the Vehicle from us according to the terms and conditions of this Lease. The consumer lease disclosures contained in this Lease are also made on behalf of Assignee.

2. VEHICLE DESCRIPTIONS

A. LEASED VEHICLE

☑ New ☐ Used	Year	Make	Model	Body Style	Odometer Reading	Vehicle Identification Number
	2003	Porsche	911 Turbo	Coupe	30	WP0CB29933S686571

Primary Use of Vehicle: ☑ Personal, family or household purposes ☐ Business, commercial or agricultural purposes

You acknowledge that you have received and examined the Vehicle described above, that the Vehicle is equipped as described and is in good operating order and condition. You accept the Vehicle for all purposes of this Lease.

B. TRADE-IN VEHICLE: Year _____ Make _____ Model _____

3. AMOUNT DUE AT LEASE SIGNING OR DELIVERY

(Itemized below)*

$ 1999.85

4. MONTHLY PAYMENTS

A. Your first Monthly Payment of $ 1912.35 is due on the Lease Date, followed by 35 payments of $ 1912.35 due on the 1 of each month.

B. The total of your Monthly Payments is $ 68844.60

5. OTHER CHARGES
(Not part of your Monthly Payment)

A. Termination Fee (if you do not purchase the Vehicle) $ 395.00

B. Total $ 395.00

6. TOTAL OF PAYMENTS
(The amount you will have paid by the end of the Lease)

$ 63327.10

(Sections 3 plus 4(B) plus 5(B) minus Sections 7(A)(3) minus 7(A)(4))

7. *ITEMIZATION OF AMOUNT DUE AT LEASE SIGNING OR DELIVERY

A. Amount Due at Lease Signing or Delivery:

(1) Capitalized Cost Reduction	$ 0.00
(2) Sales/Use Tax on Capitalized Cost Reduction	0.00
(3) First Monthly Payment	1912.35
(4) Refundable Security Deposit	0.00
(5) Initial Title, Registration and License Fees	87.50
(6) Upfront Sales/Use Tax on Vehicle	N/A
(7) _____	0.00
(8) Total	$ 1999.85

B. How the Amount Due at Lease Signing or Delivery will be Paid:

(1) Net Trade-in Allowance	$ 0.00
(2) Rebates and Noncash Credits	0.00
(3) Amount to be Paid in Cash	1999.85
(4) Total	$ 1999.85

8. YOUR MONTHLY PAYMENT IS DETERMINED AS SHOWN BELOW:

A.	**Gross Capitalized Cost.** The agreed upon value of the Vehicle ($ 114948.00) and any items you pay over the Lease Term (such as service contracts, insurance, and any outstanding prior credit or lease balance) ☐ If you want an itemization of this amount, please check this box.	$ 114948.00
B.	**Capitalized Cost Reduction.** The amount of any Net Trade-in Allowance, rebate, noncash credit, or cash you pay that reduces the Gross Capitalized Cost	− 0.00
C.	**Adjusted Capitalized Cost.** The amount used in calculating your Base Monthly Payment	= 114948.00
D.	**Residual Value.** The value of the Vehicle at the end of the Lease used in calculating your Base Monthly Payment	− 63994.10
E.	**Depreciation and any Amortized Amounts.** The amount charged for the Vehicle's decline in value through normal use and for other items paid over the Lease Term	= 50953.90
F.	**Rent Charge.** The amount charged in addition to the Depreciation and any Amortized Amounts	+ 14557.90
G.	**Total of Base Monthly Payments.** The Depreciation and any Amortized Amounts plus the Rent Charge	= 65511.80
H.	**Lease Payments.** The number of payments in your Lease (Lease Term 35 months)	÷ 35
I.	**Base Monthly Payment**	= 1871.77
J.	**Monthly Sales/Use Tax**	+ 92.58
K.	N/A	+ N/A
L.	**Total Monthly Payment** ("Monthly Payment") APP 1	= $ 1912.35

Early Termination. You may have to pay a substantial charge if you end this Lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the Lease is terminated. The earlier you end the Lease, the [illegible]

L. **Total Monthly Payment** ("Monthly Payment") ..... = $ 1912.35

Early Termination. You may have to pay a substantial charge if you end this Lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the Lease is terminated. The earlier you end the Lease, the greater this charge is likely to be.

9. **EXCESSIVE WEAR AND USE**

You may be charged for excessive wear based on our standards for normal use and for mileage in excess of 15000 miles per year at the rate of $ .18 per mile. No rebate or credit will be paid to you if the mileage is less than the specified amounts.

10. **PURCHASE OPTION AT END OF LEASE TERM**

If you have fully performed all of your obligations under this Lease, including paying the total of your Monthly Payments and all other amounts due under this Lease, then you have an option to purchase the Vehicle AS IS at the end of the Lease Term for $ 6434.10, plus any taxes, official fees and other charges related to such purchase. You must mail a notice of your decision to purchase the Vehicle to us by registered mail 45 days before the end of the Lease Term.

Other Important Terms. See both sides of this Lease for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interest, if applicable.

11. **ESTIMATED OFFICIAL FEES AND TAXES**

The total estimated amount you will pay for official and license fees, registration, title and taxes over the term of your Lease, whether included with your Monthly Payments or assessed otherwise: $ 3515.68. This is an estimate based on current tax rates, the actual total of fees and taxes may be higher or lower, depending on the tax rate in effect or the value of the Vehicle at the time a fee or tax is assessed.

12. **WARRANTIES**

If the Vehicle is new, it is covered by the standard manufacturer's new vehicle warranty. If the Vehicle is new or used, it is not covered by any other express warranty unless identified below:

- [X] The Vehicle is covered by the remainder of the standard manufacturer's new vehicle warranty.
- [ ] The Vehicle is covered by an extended warranty purchased from the manufacturer or other third party provider.
- [ ] N/A

We assign to you all rights we have under any of these warranties. You acknowledge that you have received a copy of the indicated warranties.

You expressly agree and understand that you have selected and agreed to lease the Vehicle "AS IS." WE MAKE NO WARRANTIES OR REPRESENTATIONS, EITHER EXPRESS OR IMPLIED AS TO THE VEHICLE OR ANY PART OR ACCESSORY THEREOF. WE MAKE NO WARRANTY OF MERCHANTABILITY OR FITNESS OF THE VEHICLE FOR ANY PARTICULAR PURPOSE OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER.

13. **INSURANCE VERIFICATION**

The Vehicle is insured by:

Policy Number	Insurance Company	Insurance Agent	Agent Address	Agent Phone Number
234049901349F	State Farm	Dori Schultz	2224 S 108th St West Allis WI 53227	414/327-3830

You authorize us to verify and give your agent authorization to place the minimum coverage required by this Lease (see Section 16).

14. **SIGNATURES**

YOU AGREE TO ALL THE PROVISIONS ON BOTH SIDES OF THIS LEASE AND REPRESENT THAT YOU HAVE READ BOTH SIDES OF THIS LEASE.

Marital Information. You are [X] married, [ ] unmarried, or [ ] legally separated. If you are married and your spouse is not signing this Lease:

The name of your spouse is: Maria E Tomm

Your spouse resides at:

[X] Your address shown above

[ ] _____

Marital Purpose. If you are married, the obligation evidenced by this Lease is being incurred in the interest of your marriage or family.

X _____
(Lessee Signature)

NOTICE TO LESSEE - (A) THIS IS A MOTOR VEHICLE LEASE AGREEMENT. YOU HAVE NO OWNERSHIP RIGHTS IN THE MOTOR VEHICLE UNLESS THIS LEASE CONTAINS A PURCHASE OPTION AND YOU EXERCISE YOUR OPTION TO PURCHASE THE MOTOR VEHICLE. (B) DO NOT SIGN THIS LEASE BEFORE YOU READ IT, INCLUDING ANY WRITING ON THE REVERSE SIDE. (C) DO NOT SIGN THIS IF IT CONTAINS ANY BLANK SPACES. (D) YOU ARE ENTITLED TO A COMPLETED COPY OF THIS LEASE WHEN YOU SIGN IT.

YOU ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF THIS LEASE.

INDIVIDUAL LESSEE SIGNATURE(S)	
Lessee Signature: X	Co-Lessee Signature: X

BUSINESS LESSEE SIGNATURE		
Authorized Signer's Name:	Title:	Signature: X

LESSOR SIGNATURE

The authorized signature of the Lessor below has the effect of: (1) accepting the terms and conditions of this Lease; (2) acknowledging verification of the Lessee's insurance coverage (see Section 13); and (3) assigning to USB Leasing LT or its successors and assigns all right, title and interest in, and to the Vehicle and this Lease according to the terms and conditions of the Dealer Lease Agreement between Lessor and Assignee.

Authorized Signature: X

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS.

Bankers Systems, Inc., St. Cloud, MN Form USB-CE-MP-WI 10/23/2002

For use in: WI (Side 1)

Top Copy - LESSOR COPY | 2nd Copy - LESSEE COPY | 3rd Copy - FILE COPY | 4th Copy - DEALER COPY

15. **LATE CHARGE; RETURNED INSTRUMENT CHARGE**
If all or any portion of a Monthly Payment or any other amount due under this Lease is not received within 10 days after it is due, you will pay a late charge of $10, or 5% of the unpaid amount, whichever is less.

If any check, draft or order or other similar instrument is returned to us unpaid for any reason, including, but not limited to, non-sufficient funds, you will pay a returned instrument charge of $15, to the extent not prohibited by applicable law.

16. **INSURANCE**
Unless otherwise agreed, you must provide insurance coverage in the amount and types indicated below at your expense during the Lease Term and until the Vehicle is returned to us:

A. Fire, theft and comprehensive insurance with a maximum deductible of $500;
B. Collision insurance with a maximum deductible of $500;
C. Liability insurance for bodily injury or death to any one person in the amount of $100,000 and for any one accident in the amount of $300,000 or combined single limit coverage of $300,000;
D. Property damage insurance for $50,000; and
E. Uninsured and underinsured motorist coverage and any other insurance required by the state where the Vehicle is registered.

The insurance policy must name us as loss payee and an additional insured. The policy also must require the insurance company to notify us 10 days before any cancellation or changes in insurance coverage.

You will notify us and your insurance company within 24 hours after any damage, loss, theft, seizure or impoundment of the Vehicle. You assign to us any amounts payable under such insurance policies. You agree that we may endorse your name upon any check, draft, order or other similar instrument representing payment to you of such amounts.

You may purchase a motor vehicle insurance policy covering the loss of or damage to the Vehicle and liability arising out of the ownership, maintenance or use of the Vehicle from any insurer authorized to issue motor vehicle insurance policies in Wisconsin and through any agent currently licensed under Wisconsin law. At any time during the lease term, you may substitute for an existing motor vehicle insurance policy any other policy with similar coverage issued by any other insurer authorized to issue motor vehicle insurance policies in Wisconsin or sold by any other agent currently licensed under Wisconsin law. We may for reasonable cause decline the insurance provided by you.

NO PHYSICAL DAMAGE OR LIABILITY INSURANCE COVERAGE FOR BODILY INJURY OR PROPERTY DAMAGE CAUSED TO OTHERS IS INCLUDED IN THIS LEASE.

17. **VEHICLE OPERATION**
A. VEHICLE MAINTENANCE AND OPERATING COSTS. You agree to maintain the Vehicle in good working order and operating condition and have all necessary repairs made. You are responsible for all costs of maintaining and servicing the Vehicle. You agree to have the Vehicle serviced and repaired according to the manufacturer's recommendations and to ensure that the warranty, if any, remains valid. You will keep all maintenance and repair records. You agree to comply with all manufacturer recall notices. You agree to pay for all operating costs including, but not limited to, gas, oil, antifreeze, parking fees, towing and replacement tires.
B. VEHICLE USE. You will: (1) allow the Vehicle to be operated only by licensed and insured drivers; (2) not use the Vehicle for any improper or illegal purpose, or to commit any illegal act; (3) not use the Vehicle to transport passengers or goods for hire, including but not limited to use as taxi cab, limousine, for livery, as a municipal vehicle, ambulance, hearse, or in driver education; (4) not use the Vehicle in any way that causes the cancellation or suspension of any applicable insurance or manufacturer's warranty; (5) not use the Vehicle in towing, snow plowing, construction, or for hauling; (6) not remove the Vehicle from the state where you reside for more than 30 consecutive days without our prior written approval; (7) not remove the Vehicle from the continental United States for any period of time without our prior written approval; (8) not change or modify the Vehicle in any way without our prior written approval, except for normal maintenance; and (9) deliver the Vehicle to such location that we require for our inspection at any time during the Lease Term. **You will not assign or sublease any interest in the Vehicle or the Lease without our written consent.**
C. TAXES, REGISTRATION AND TITLING. You agree to pay all title, registration, license, inspection, testing, and other fees, taxes and charges imposed by government authorities in connection with the Vehicle, this Lease or any amounts due or payable arising from this Lease. If such amounts are assessed for a period during the Lease Term, you will pay them even if they become due after the Lease Term.

You agree to title, register and license the Vehicle in the state in which it is garaged. You must request any power of attorney required from us to title, register or license the Vehicle. You agree to pay a $25 title transfer fee each time the Vehicle is retitled. **If the Vehicle is registered in a jurisdiction which assesses personal property taxes, you agree to pay the personal property tax.**

18. **PURCHASE OPTION**
A. END OF LEASE TERM. At scheduled Lease termination, you have an option to purchase the Vehicle AS IS as set forth in Section 10 of this Lease.
B. PRIOR TO END OF LEASE TERM. At any time prior to scheduled Lease termination, you have an option to purchase the Vehicle AS IS. The Purchase Option Price will be a sum equal to: (1) the
D. LEASE BALANCE. The Lease Balance is equal to:
(1) The Base Monthly Payment times the number of Monthly Payments not yet due; **minus**
(2) Unearned Rent Charges included in the Base Monthly Payments not yet due calculated according to the Actuarial Method.

The term "Actuarial Method" means the method of allocating Base Monthly Payments between: (i) the reduction of the Adjusted Capitalized Cost to the Residual Value over the Lease Term; and (ii) Rent Charges. Under this method, a Base Monthly Payment is applied first to the accumulated Rent Charges and any remainder is subtracted from, or any deficiency is added to, the balance of the Adjusted Capitalized Cost.

E. REALIZED VALUE. The Realized Value will be determined in one of the following ways:
(1) By a written agreement between you and us;
(2) Within 7 business days of early termination, you may obtain, at your own expense, from an independent third party agreeable to both you and us, a professional appraisal of the wholesale value of the Vehicle which could be realized at sale. The appraised value shall then be used as the Realized Value.
(3) We determine the Realized Value in accordance with accepted practices in the automobile industry for determining the wholesale value of used vehicles by obtaining a wholesale cash bid for the purchase of the Vehicle or by disposing of the Vehicle in an otherwise commercially reasonable manner.
(4) If the Vehicle is subject to a total loss due to collision, destruction or unknown theft as determined by us, the Realized Value will equal the sum of the amount of any proceeds we receive from your required insurance and any amounts received by us from any other party in payment for the total loss of the Vehicle. If there are no insurance proceeds or amounts, the Realized Value will be zero.

23. **DEFAULT**
A. DEFAULT. The following are events of default ("Default") if they materially impair the condition, value or protection of the Vehicle or your ability to pay amounts due under this Lease:
(1) You have outstanding an amount (excluding late charges) exceeding one full Monthly Payment which has remained unpaid for more than 10 days after the scheduled due dates or you fail to pay the first Monthly Payment or the last Monthly Payment within 40 days of their scheduled due dates;
(2) You fail to keep any promise in this Lease or any agreement made in connection with this Lease;
(3) You fail to maintain insurance on the Vehicle as required by this Lease;
(4) You fail to return the Vehicle to us at the time and place we specify;
(5) You die, are declared incompetent, become insolvent, a bankruptcy petition is filed by or against you or you dissolve or cease active business affairs;
(6) You make any material misrepresentation on your credit application;
(7) The Vehicle is subject to actual or threatened seizure, confiscation or levy by governmental or legal process;
(8) Your driver's license expires or is suspended, revoked, cancelled or is otherwise restricted;
(9) The Vehicle is subject to a total loss due to collision, destruction, or unknown theft; or
(10) Anything else happens that adversely affects our interest in the Vehicle or your ability to comply with your obligations under this Lease.

B. REMEDIES. If this Lease is in Default, we may take any one or more of the following actions:
(1) Terminate this Lease and your rights to use the Vehicle.
(2) Take possession of the Vehicle without prior demand, unless otherwise required by law. We may take any personal property that is in or on the Vehicle when we take it. We will hold the personal property for you for ten (10) days, but we will neither be responsible for safekeeping such property nor are we required to notify you about it. If you do not pick up the property within that time, we may dispose of it any way we determine.
(3) Recover all expenses related to enforcing this Lease and obtaining, storing and selling the Vehicle, to the extent not prohibited by law.
(4) Take any reasonable action to correct the default or to prevent our loss. You agree to reimburse us for any amounts we pay to correct or cover your Default.
(5) Require you to return the Vehicle and any related records or make them available to us in a reasonable manner.
(6) Make a claim for any and all insurance, warranty, mechanical breakdown protection or maintenance contract benefits or refunds that may be available on your Default or on the termination of the Lease and apply any amount received to the amount you owe.
(7) Assess interest on all outstanding amounts owing to us under this Lease, including without limitation, amounts owing for excess wear and use and for excess mileage, at the highest rate permitted by applicable law until such amounts are paid in full.

amount set forth in Section 10; **plus** (2) the Early Termination Liability set forth in Section 22(C) below, excluding the items set forth in Sections 22(C)(1), (C)(6) and (C)(7). You must mail a notice of your decision to purchase the Vehicle to us by registered mail 45 days prior to the date of purchase.

19. EXCESS WEAR AND USE

We have based the Monthly Payment on the assumption that you will not subject the Vehicle to excess wear and use. You agree not to expose the Vehicle to excess wear and use. If you do so and if you do not purchase the Vehicle at the scheduled end of the Lease Term, you agree to pay us the amount that it would cost to make all repairs to the Vehicle that are not the result of normal wear whether or not we, in our sole discretion, actually make the repairs. Any excess wear and use assessed at scheduled termination of this Lease will be based upon an estimate of the repair cost unless we actually make the repairs.

Excess wear and use includes, but is not limited to, the amount it would cost to repair: (1) inoperative mechanical parts, including power accessories; (2) dented, scratched, chipped or rusted areas on the body; (3) mismatched paint or any special identification mark; (4) cracked, scratched, pitted or chipped windows, broken or discolored windows or inoperative window mechanisms; (5) broken headlight lenses or sealed beams; (6) scratches more than two inches long through the chrome on bumpers or bumper dents; (7) broken grills or dents in the grills; (8) single dents or a series of dents on other trim parts, including headlight and tail light bezels; (9) electronic malfunctions; (10) seats, seat belts, headlining, dashboards, door panels or carpeting which is torn or damaged beyond ordinary wear and tear or is burned; (11) major fluid leaks; (12) damaged exhaust systems; (13) damage from flood, water, hail or sand; (14) damage which makes the Vehicle either unsafe or unlawful to operate; (15) all damage which would be covered by the required comprehensive, collision and upset insurance whether or not such insurance actually is in force; and (16) the Vehicle to restore any original equipment or accessories which were removed or altered during the Lease Term.

Excess wear and use also includes, but is not limited to, the amount it would cost to replace: (i) any tire not part of a matching set of five tires (or four with emergency "doughnut" spare if initially so equipped); (ii) any tires with less than 1/8 inch of tread remaining at the shallowest point; (iii) any tire with gouged, cut, torn or plugged sidewalls; (iv) any missing or dented parts, accessories and adornments, including bumpers, jacks, ornamentation, aerials, hubcaps, chrome stripping, rear view mirrors, radio and stereo components or spare tire; or (v) any parts which are not original manufacturer equipment or of equal quality and design.

20. VEHICLE RETURN

If you do not exercise your Purchase Option, you must return the Vehicle to us at the time and place we specify. If you fail to return the Vehicle, you must continue to make your Monthly Payment to us on a month-to-month basis as approved by us, but in no circumstance can the Lease Term continue for more than 6 months beyond the scheduled Lease termination date.

21. SCHEDULED TERMINATION

Except for Early Termination, this Lease will terminate or end upon:

A. The end of the Lease Term;
B. Return of the Vehicle;
C. Completion of a signed odometer statement; and
D. Payment of the following amounts:
   (1) The Termination Fee;
   (2) Any amounts owed for Excess Wear;
   (3) Any amounts owed for Excess Mileage;
   (4) All amounts due and unpaid under this Lease; and
   (5) Any official fees and taxes due in connection with Lease termination.

22. EARLY TERMINATION

A. LESSEE'S RIGHT TO TERMINATE EARLY. You may terminate this Lease before the end of the Lease Term if you are not in Default. If you do not exercise your purchase option, the charge for such Early Termination is the Early Termination Liability defined below. You must send us written notice of your early termination by registered mail 30 days before the date of termination.

B. LESSOR'S RIGHT TO TERMINATE EARLY. We may terminate this Lease before the end of the Lease Term if you are in Default. If you do not exercise your purchase option, upon such termination we shall be entitled to the Early Termination Liability defined below.

C. EARLY TERMINATION LIABILITY. The Early Termination Liability is calculated as follows:
   (1) The Termination Fee; **plus**
   (2) All unpaid amounts that are due or past due under this Lease; **plus**
   (3) Any official fees, taxes and other charges related to early termination; **plus**
   (4) All expenses related to recovering, obtaining, storing, preparing for sale and selling the Vehicle, **plus**
   (5) The Lease Balance; **plus**
   (6) The Residual Value of the Vehicle; **minus**
   (7) The Realized Value of the Vehicle.
   (8) Use any remedy we have at law or in equity.

24. REIMBURSEMENT

You will reimburse us for and hold us harmless from any loss or damage to the Vehicle and its contents and from all claims, losses and injuries, expenses and costs related to the use, maintenance or condition of the Vehicle or its driver. If you fail to pay, you will reimburse us and pay a $25 administration fee, where permitted by law, for any fine, ticket, penalty or other amount that is paid on your behalf

25. WAIVER OF GAP AMOUNT; TOTAL LOSS OF VEHICLE.

If the Vehicle is subject to a total loss due to collision, destruction or unknown theft as determined by us, you will pay to us the Gap Amount, which is the difference between the Early Termination Liability set forth in Section 22(C) and the insurance proceeds received by us on account of the total loss of the Vehicle. However, if you had in effect the vehicle insurance required under this Lease at the time of the total loss, we will waive the Gap Amount and you will pay to us the sum of: (A) all Monthly Payments overdue and any other amounts that are due or past due at the time of the loss; plus (B) the amount of your insurance deductible and any other amounts that were subtracted from the Vehicle's actual cash value to determine the insurance proceeds we received for the total loss; plus (C) any rebates of charges for warranties, mechanical breakdown protection or maintenance contracts purchased in connection with this Lease. Even if the Vehicle is insured, you must continue to pay your scheduled Monthly Payments until we receive your full insurance proceeds.

26. REFUNDABLE SECURITY DEPOSIT

Your Refundable Security Deposit may be used by us to pay all amounts that you fail to pay under this Lease. Upon termination of this Lease and our determination that no additional amounts may be due after Lease termination (such as personal property taxes not yet billed), we will refund to you any portion of the Refundable Security Deposit not applied to amounts you owe and fail to pay under this Lease. Your Refundable Security Deposit cannot be used as a Monthly Payment. You will not earn interest on your Refundable Security Deposit. Any interest or monetary benefit to us which may accrue as a result of our retention of the Refundable Security Deposit will neither be paid to you nor applied to reduce your obligations under this Lease.

27. GENERAL

A. SECURITY INTEREST. You grant us a security interest, to the extent permitted by state law, in the property listed below to secure performance of your obligations under this Lease: (1) in loss proceeds of any Vehicle insurance; (2) in the proceeds of any credit life or disability insurance, mechanical breakdown protection contract or maintenance contract purchased with this Lease; and (3) any unearned premiums or refunds of any of the foregoing.

B. ODOMETER STATEMENT. Federal Law requires that you disclose the Vehicle's odometer reading to us upon termination of this Lease or transfer of ownership. Failure to complete an odometer disclosure statement, failure to return it to us or making a false statement therein may result in fines and/or imprisonment. You will be provided an odometer disclosure statement to complete prior to the termination of the Lease.

C. OWNERSHIP. This agreement is a lease only. We are the owner of the Vehicle. You have no rights of ownership or title to the Vehicle unless you exercise your purchase option. You will not allow any lien or encumbrance to attach to the Vehicle.

D. **RIGHT OF SET-OFF. We may apply any money in any deposit account you have with us and on which your name appears as owner or co-owner to the payment of amounts you owe to us.**

E. ENFORCEABILITY. This Lease will be governed and enforced by the laws of the state in which it was signed. Each Lessee is responsible, individually and together, under this Lease. This is known as "joint and several" responsibility. If any provision of this Lease is found unenforceable by any court, the remaining provisions of the Lease will remain in full force and effect.

F. WARRANTY OF AMOUNT OWED. You promise that the amount owed on the outstanding balance of any financing agreement on any trade-in vehicle is accurate. If the amount owed is more than the amount represented to the Lessor, you will pay Lessor the excess amount upon demand.

G. **ENTIRE AGREEMENT. Important: Read before signing. The terms of this Lease should be read carefully because only those terms in writing are enforceable. No other terms or oral promises not contained in this Lease may be legally enforced. You may change the terms of this Lease only by another written agreement. This Lease is a final expression of the credit agreement between you and us. This Lease may not be contradicted by evidence of any prior oral credit agreement or of a contemporaneous oral credit agreement between you and us.**

Bankers Systems, Inc., St. Cloud, MN Form USB-CE-MP-WI 10/23/2002

For use in: WI (Side 2)

Top Copy - LESSOR COPY 2nd Copy - LESSEE COPY 3rd Copy - FILE COPY 4th Copy - DEALER COPY

1983 Assembly Bill 16

Date of enactment: **October 26, 1983**
Date of publication: **November 2, 1983**

1983 Wisconsin Act 48

AN ACT *to create* 218.015 of the statutes, *relating to* repair, replacement and refund under new motor vehicle warranties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 218.015 of the statutes is created to read:

218.015 Repair, replacement and refund under new motor vehicle warranties. (1) In this section:

(a) "Collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of obtaining alternative transportation.

(b) "Consumer" means any of the following:

1. The purchaser of a new motor vehicle, if the motor vehicle was purchased from a motor vehicle dealer for purposes other than resale.

2. A person to whom the motor vehicle is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the motor vehicle.

3. A person who may enforce the warranty.

(c) "Manufacturer" means a manufacturer as defined in s. 218.01 (1) (n) and agents of the manufacturer, including an importer, a distributor, factory branch, distributor branch and any warrantors of the manufacturer's motor vehicles, but not including a motor vehicle dealer.

(d) "Motor vehicle" means a motor vehicle as defined in s. 218.01 (1) (k), but does not include any vehicle that is not motor-driven.

(e) "Motor vehicle dealer" has the meaning given under s. 218.01 (1) (a).

(f) "Nonconformity" means 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, 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.

(g) "Reasonable allowance for use" means an amount attributable to a consumer's use of a motor vehicle, but does not include any period after the consumer's first report to the manufacturer or any of its authorized motor vehicle dealers of a nonconformity with an express warranty applicable to the motor vehicle during which the motor vehicle is out of service due to the nonconformity.

(h) "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 or any of its authorized motor vehicle dealers at least 4 times and the nonconformity continues.

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

(2) (a) If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer or any of its authorized motor vehicle dealers and makes the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be repaired.

(b) If after a reasonable attempt to repair the nonconformity cannot be repaired, the manufacturer shall, at the direction of the consumer, either replace the motor vehicle with a comparable new motor vehicle or accept return of the motor vehicle and refund the full purchase price plus any amounts paid by the consumer at the point of sale and all collateral costs associated with the repair of the nonconformity less a reasonable allowance for use to the consumer and any holder of a perfected security interest in the motor vehicle, as their interests may appear.

(c) At the time of receiving the comparable new motor vehicle or refund under par. (b), the consumer shall surrender the motor vehicle subject to the nonconformity to the manufacturer together with the certificate of title with all endorsements necessary to transfer title to the manufacturer. The manufacturer shall provide the consumer with the comparable new motor vehicle or refund no later than 30 days after an offer to transfer title in compliance with this paragraph by the consumer.

(d) No motor vehicle returned by a consumer under par. (b) may be resold unless full disclosure of the reasons for return is made to any prospective buyer.

(3) All time periods under subs. (1) (h) and (2) (a) are extended by any period during which repair services are not available to the consumer because of war, invasion, civil disturbance, strike, casualty or natural disaster.

(4) Subsection (2) (b) does not apply to a consumer who has not resorted to an informal dispute settlement procedure available to the consumer and:

(a) Complying with 16 CFR Part 703; or

(b) Providing protections for the consumer equal to or greater than those provided under 16 CFR Part 703.

(5) This section does not limit rights or remedies available to a consumer under any other law.

(6) Any waiver by a consumer of rights under this section is void.

(7) In addition to any other remedies, a consumer damaged by a violation of this section may bring an action for twice the amount of any pecuniary loss, together with costs and disbursements and reasonable attorney fees, and for equitable relief determined by the court.

SECTION 2. **Initial applicability.** This act applies to new motor vehicles sold in this state to consumers on or after the effective date of this act.

1985 Assembly Bill 434

Date of enactment: **April 10, 1986**
Date of publication: **April 21, 1986**

1985 Wisconsin Act 205

AN ACT *to repeal* 218.015 (1) (g); *to amend* 218.01 (9) (a), 218.015 (1) (f), 218.015 (2) (b) and (d) and 218.015 (7); *to repeal and recreate* 218.015 (1) (d) and 218.015 (3) and (4); and *to create* 20.835 (2) (eq), 218.01 (3) (a) 35, 218.015 (1) (bd) and (bp) and 218.015 (2) (e) of the statutes, *relating to* various changes with respect to the law governing repair, replacement and refund under new motor vehicle warranties and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.835 (2) (eq) of the statutes is created to read:

20.835 (2) (eq) *Sales tax refunds.* A sum sufficient to pay refunds under s. 218.015 (2) (e).

SECTION 1b. 218.01 (3) (a) 35 of the statutes is created to read:

218.01 (3) (a) 35. Being a manufacturer, factory branch or distributor who engages in any action which transfers to a motor vehicle dealer any responsibility of the manufacturer, factory branch or distributor under s. 218.015.

SECTION 1d. 218.01 (9) (a) of the statutes is amended to read:

218.01 (9) (a) Any licensee suffering pecuniary loss because of a violation by any other licensee of sub. (3) (a) 4, 11, 15, 16, 17, 23, 24, 26 ~~or,~~ 32 or 35 or because of any unfair practice found by the commissioner or office of the commissioner of transportation under sub. (5) (a) may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss together with costs including a reasonable attorney fee.

SECTION 1m. 218.015 (1) (bd) and (bp) of the statutes are created to read:

218.015 (1) (bd) "Demonstrator" means used primarily for the purpose of demonstration to the public.

(bp) "Executive" means used primarily by an executive of a licensed manufacturer, distributor or dealer, and not used for demonstration to the public.

SECTION 2. 218.015 (1) (d) of the statutes is repealed and recreated to read:

218.015 (1) (d) "Motor vehicle" means any motor driven vehicle required to be registered under ch. 341, including a demonstrator or executive vehicle not titled or titled by a manufacturer or a motor vehicle dealer, which a consumer purchases or accepts transfer of in this state. "Motor vehicle" does not mean a moped, semitrailer or trailer designed for use in combination with a truck or truck tractor.

SECTION 2m. 218.015 (1) (f) of the statutes is amended to read:

218.015 (1) (f) "Nonconformity" means 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.

SECTION 3. 218.015 (1) (g) of the statutes is repealed.

SECTION 4. 218.015 (2) (b) and (d) of the statutes are amended to read:

218.015 (2) (b) If after a reasonable attempt to repair the nonconformity ~~cannot be~~ is not repaired, the manufacturer shall, at the direction of the consumer, either replace the motor vehicle with a comparable new motor vehicle or accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the motor vehicle, as their interest may appear, the full purchase price plus any ~~amounts~~ sales tax, finance charge, amount paid by the consumer at the point of sale and ~~all~~ collateral ~~costs~~ cost associated with the repair of the nonconformity, less a reasonable allowance for use ~~to the consumer and any holder of a perfected security interest in the motor vehicle, as their interests may appear~~. A reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motor vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the motor vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer.

(d) No motor vehicle returned by a consumer in this state under par. (b), or by a consumer in another state under a similar law of that state, may be resold in this state unless full disclosure of the reasons for return is made to any prospective buyer.

SECTION 4m. 218.015 (2) (e) of the statutes is created to read:

218.015 (2) (e) The department of revenue shall refund to the manufacturer any sales tax which the manufacturer refunded to the consumer under par. (b) if the manufacturer provides to the department of revenue a written request for a refund along with evidence that the sales tax was paid when the motor vehicle was purchased and that the manufacturer refunded the sales tax to the consumer.

SECTION 5. 218.015 (3) and (4) of the statutes are repealed and recreated to read:

218.015 (3) If there is available to the consumer an informal dispute settlement procedure which is certified under sub. (4), the consumer may not bring an action under sub. (7) unless he or she first resorts to that procedure.

(4) (a) The department of transportation shall adopt rules specifying the requirements with which each informal dispute settlement procedure shall comply. The rules shall require each person establishing an informal dispute settlement procedure to do all of the following:

1. Provide rights and procedures at least as favorable to the consumer as are required under 16 CFR Part 703, in effect on November 3, 1983.

2. If after a reasonable attempt to repair the nonconformity is not repaired, require the manufacturer to provide a remedy as set forth under sub. (2) (b).

(b) The department of transportation shall investigate each informal dispute settlement procedure provided in this state to determine whether it complies with the rules adopted under par. (a). The department shall certify each informal dispute settlement procedure which complies. The department may revoke certification if it determines that an informal dispute settlement procedure no longer complies with the rules promulgated under par. (a). Annually, the department shall publish a report evaluating the informal dispute settlement procedures provided in this state, stating whether those procedures are certified and stating the reasons for the failure of any procedure to obtain certification or for the revocation of any certification.

(c) Any person who establishes an informal dispute settlement procedure the certification of which is denied or revoked by the department of transportation may appeal that denial or revocation under ch. 227.

(d) Annually, any person who establishes an informal dispute settlement procedure shall file with the department of transportation a copy of the annual audit required under 16 CFR Part 703 or a substantially similar audit and any additional information the department requires in order to evaluate informal dispute settlement procedures.

(e) The department of transportation may consider whether a manufacturer obtains certification under this subsection in determining whether to issue a manufacturer's license to do business in this state.

SECTION 6. 218.015 (7) of the statutes is amended to read:

218.015 (7) In addition to pursuing any other ~~remedies~~ remedy, a consumer ~~damaged~~ may bring an action to recover for any damages caused by a violation of this section ~~may bring an action for~~. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs ~~and~~, disbursements and reasonable attorney fees, and ~~for~~ any equitable relief ~~determined by~~ the court determines appropriate.

SECTION 7. **Nonstatutory provisions.** This act applies to any motor vehicle, as defined in section 218.015 (1) (d) of the statutes, as affected by this act, with respect to which the contract to purchase is entered into on or after the effective date of this SECTION.

SECTION 7m. **Program responsibility changes.** In the sections of the statutes listed in Column A, the program responsibilities references shown in Column B are deleted and the program responsibilities references shown in Column C are inserted:

A	B	C
Statute Sections	References Deleted	References Inserted
15.431 (intro.)	none	218.015 (2)(e)

SECTION 8. **Cross-reference changes.** In the sections of the statutes listed in Column A, the cross-references shown in Column B are changed to the cross-references shown in Column C:

A	B	C
Statute Sections	Old Cross-References	New Cross-References
218.015 (1)(c)	218.01 (1)(n)	218.01 (1)(L)
218.015 (1)(e)	218.01 (1)(a)	218.01 (1)(n)

1987 Assembly Bill 188

Date of enactment: **November 25, 1987**
Date of publication: **December 7, 1987**

1987 Wisconsin Act 105

AN ACT *to amend* 218.015 (1) (h) 1, 218.015 (2) (a) and (b), 218.015 (2) (c) and 218.015 (2) (d); and *to create* 218.015 (1) (b) 4, (bg), (bj) and (em), 218.015 (2) (b) 3 and 218.015 (2) (cm) of the statutes, *relating to* extending the coverage of the motor vehicle warranty law to leased motor vehicles.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 218.015 (1) (b) 4, (bg), (bj) and (em) of the statutes are created to read:

218.015 (1) (b) 4. A person who leases a motor vehicle from a motor vehicle lessor under a written lease.

(bg) "Early termination cost" means any expense or obligation a motor vehicle lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motor vehicle to a manufacturer under sub. (2) (b) 3. "Early termination cost" includes a penalty for prepayment under a finance arrangement.

(bj) "Early termination savings" means any expense or obligation a motor vehicle lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motor vehicle to a manufacturer under sub. (2) (b) 3. "Early termination savings" includes an interest charge the motor vehicle lessor would have paid to finance the motor vehicle or, if the motor vehicle lessor does not finance the motor vehicle, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(em) "Motor vehicle lessor" means a person who holds title to a motor vehicle leased to a lessee, or who holds the lessor's rights, under a written lease.

SECTION 2. 218.015 (1) (h) 1 of the statutes is amended to read:

218.015 (1) (h) 1. The same nonconformity with the warranty is subject to repair by the manufacturer, motor vehicle lessor or any of ~~its~~ the manufacturer's authorized motor vehicle dealers at least 4 times and the nonconformity continues.

SECTION 3. 218.015 (2) (a) and (b) of the statutes are amended to read:

218.015 (2) (a) If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the motor vehicle lessor or any of ~~its~~ the manufacturer's authorized motor vehicle dealers and makes the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be repaired.

(b) 1. If after a reasonable attempt to repair the nonconformity is not repaired, the manufacturer shall~~, at~~ carry out the requirement under subd. 2 or 3, whichever is appropriate.

2. At the direction of ~~the~~ a consumer~~,~~ described under sub. (1) (b) 1, 2 or 3, do either ~~replace~~ of the following:

a. Accept return of the motor vehicle and replace the motor vehicle with a comparable new motor vehicle ~~or accept~~.

b. Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interests may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral cost associated with the repair of the nonconformity, less a reasonable allowance for use. ~~A~~ Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motor vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the motor vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer.

SECTION 4. 218.015 (2) (b) 3 of the statutes is created to read:

218.015 (2) (b) 3. a. With respect to a consumer described in sub. (1) (b) 4, 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 interests 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.

b. Under this subdivision, the current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at the lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings.

c. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the consumer drove the motor vehicle before first reporting the nonconformity to the manufacturer, motor vehicle lessor or motor vehicle dealer.

SECTION 5. 218.015 (2) (c) of the statutes is amended to read:

218.015 (2) (c) ~~At the time of receiving the comparable new motor vehicle or refund under par. (b)~~ To receive a comparable new motor vehicle or a refund due under par. (b) 1 or 2, a consumer described under sub. (1) (b) 1, 2 or 3 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 consumer with the comparable new motor vehicle or refund. When the manufacturer provides the new motor vehicle or refund, the consumer shall ~~surrender~~ return the motor vehicle ~~subject to~~ having the nonconformity to the manufacturer ~~together~~ and provide the manufacturer with the certificate of title ~~with~~ and all endorsements necessary to transfer title to the manufacturer. ~~The manufacturer shall provide the consumer with the comparable new motor vehicle or refund no later than 30 days after an offer to transfer title in compliance with this paragraph by the consumer.~~

SECTION 6. 218.015 (2) (cm) of the statutes is created to read:

218.015 (2) (cm) 1. 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.

2. 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.

3. No person may enforce the lease against the consumer after the consumer receives a refund due under par. (b) 3.

SECTION 7. 218.015 (2) (d) of the statutes is amended to read:

218.015 (2) (d) No motor vehicle returned by a consumer or motor vehicle lessor in this state under par. (b), or by a consumer or motor vehicle lessor in another state under a similar law of that state, may be ~~resold~~ sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.

SECTION 8. **Nonstatutory provisions.** This act applies to any motor vehicle, as defined in section 218.015 (1) (d) of the statutes, with respect to which a lease is entered into on or after the effective date of this SECTION.

RITA RESEARCH AND INNOVATIVE TECHNOLOGY ADMINISTRATION
BUREAU OF TRANSPORTATION STATISTICS

Table 1-17: New and Used Passenger Car Sales and Leases

(Thousands of vehicles)

Excel | CSV

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Total, vehicle sales and leases	**51,390**	**49,599**	**49,807**	**51,940**	**55,186**	**56,476**	**55,891**	**56,351**	**56,375**	**57,618**	**58,964**	**59,742**	**59,835**	**60,215**	**59,411**	**61,086**	**59,070**	**58,547**
New vehicle sales and leases	**13,860**	**12,309**	**12,857**	**13,883**	**15,045**	**14,718**	**15,090**	**15,114**	**15,534**	**16,879**	**17,344**	**17,118**	**16,810**	**16,643**	**16,866**	**16,948**	**16,504**	**17,129**
Passenger cars	9,300	8,175	8,214	8,518	8,990	8,636	8,527	8,273	8,142	8,697	8,852	8,422	8,102	7,615	7,505	7,667	7,781	8,085
Light Trucks	4,560	4,134	4,643	5,365	6,055	6,081	6,563	6,842	7,392	8,183	8,492	8,696	8,708	9,029	(R) 9,361	9,281	8,724	9,044
New vehicle sales[a]	**13,285**	**11,566**	**11,654**	**12,031**	**12,526**	**12,070**	**12,127**	**11,690**	**11,947**	**12,468**	**13,181**	**13,510**	**13,639**	**13,594**	**13,609**	**13,551**	**13,271**	**13,671**
Passenger cars	8,766	7,508	7,332	7,321	7,275	6,841	6,721	6,211	5,968	6,396	6,580	6,407	6,370	5,932	5,737	5,806	6,088	6,342
Light Trucks	4,519	4,058	4,322	4,710	5,251	5,228	5,406	5,480	5,979	6,073	6,601	7,103	7,269	7,663	7,872	7,745	7,184	7,329
New vehicle leases[b]	**575**	**743**	**1,203**	**1,852**	**2,519**	**2,648**	**2,963**	**3,424**	**3,587**	**4,411**	**4,163**	**3,608**	**3,171**	**3,049**	**3,257**	**3,397**	**3,233**	**3,458**
Passenger cars	534	667	882	1,197	1,715	1,795	1,806	2,062	2,174	2,301	2,272	2,015	1,732	1,683	1,768	1,861	1,693	1,743
Light Trucks	41	76	321	655	804	853	1,157	1,362	1,413	2,110	1,891	1,593	1,439	1,366	1,489	1,536	1,540	1,715
Used vehicle sales[c]	**37,530**	**37,290**	**36,950**	**38,057**	**40,141**	**41,758**	**40,801**	**41,237**	**40,841**	**40,739**	**41,620**	**42,624**	**43,025**	**43,572**	**42,545**	**44,138**	**42,566**	**41,418**
Value ($ in billions)[d]																		
Total, new and used vehicle sales	446	438	486	524	582	611	627	642	651	698	(R) 737	737	721	738	(R) 765	(R) 776	786	774
New vehicle sales	227	208	240	267	291	292	298	306	316	348	380	369	371	382	407	(R) 421	445	435
Used vehicle sales	219	230	246	257	291	319	329	336	335	350	(R) 356	367	350	356	(R) 358	(R) 355	341	339
Average Price (current $)[d]																		
New and used vehicle sales	8,672	8,823	9,759	10,078	10,543	10,818	11,221	11,385	11,545	12,098	(R) 12,469	12,321	12,034	12,253	(R) 12,868	(R) 12,695	13,827	13,451
New vehicle sales	16,350	16,880	18,655	19,200	19,335	19,819	19,727	20,214	20,276	20,534	21,850	21,507	22,005	22,894	24,082	(R) 27,496	26,854	26,950
Used vehicle sales	5,830	6,157	6,656	6,742	7,245	7,644	8,073	8,139	8,211	8,587	(R) 8,547	8,619	8,130	8,180	(R) 8,410	(R) 8,036	8,009	8,186

KEY: R = revised.

[a] New vehicle sales data is calculated by subtracting CNW Marketing's vehicle leasing data from BEA's data which combines sales and leases (see below for sources).

[b] Consumer leases only.

[c] Used car sales include sales from franchised dealers, independent dealers, and casual sales.

[d] Includes leased vehicles.

NOTE

Vehicle sales, value of sales, and average prices are from different sources and cannot be calculated from the data presented in this table.

SOURCES

New vehicle sales and leases:

U.S. Department of Commerce, Bureau of Economic Analysis, Underlying Detail for the National Income and Product Account Tables, Internet site http://www.bea.doc.gov/ as of Mar. 12, 2008, table 7.2.5S.

New vehicle sales:

Calculated by U.S. Department of Transportation, Bureau of Transportation Statistics.

New vehicle leases:

CNW Marketing / Research, personal communication, Mar. 18, 2007.

Used vehicle sales, value, and average price:

Manheim Consulting, Used Car Market Report, (Atlanta, GA: Annual issues), Internet site http://www.manheimconsulting.com/ as of Mar. 12, 2008

Find this web page at:

http://www.bts.gov/publications/national_transportation_statistics/html/table_01_17.html

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO.: 2008AP001913-CQ

BRUCE A. TAMMI,

Plaintiff-Appellee,

vs.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant-Appellant.

CERTIFIED QUESTIONS FROM SEVENTH CIRCUIT COURT OF APPEALS, APPEAL NO. 07-1832

REPLY BRIEF OF DEFENDANT-APPELLANT, PORSCHE CARS NORTH AMERICA, INC.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant,
PORSCHE CARS NORTH AMERICA, INC.
Jeffrey S. Fertl
State Bar No. 1014806

P.O. ADDRESS:

100 E. Wisconsin Avenue
Suite 2600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

I. ARGUMENT.

A. Tammi Fails To Explain How The Amount Voluntarily Paid To Purchase The Vehicle At The Conclusion Of The Lease Represents A Consumer's Pecuniary Loss Caused By A Statutory Violation.

Mr. Tammi's response brief is filled with irrelevant facts and arguments not supported by the record or any legal precedent. His entire recitation of facts related to why he leased the subject vehicle and other unrelated vehicles is wholly irrelevant and should be disregarded. The only relevant fact is that he leased the vehicle with an "option" to purchase it. That being the case, Tammi continues to be unable to explain how his voluntary purchase of the vehicle was caused by Porsche's violation of the Lemon Law statute.

Instead of explaining how Porsche's alleged violation of the statute caused him to purchase the vehicle, Tammi argues that "what Porsche Cars caused appellee to do is not relevant to the issues of his damages." (Response Brief, p. 39). This argument is wholly without merit considering recovery of pecuniary loss under § 218.0171(7) is premised on causation. Under the plain statutory language, an action under § 218.0171(7) is for damages caused by a violation of the statute. Subsection (7) provides:

> 7. In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by violation of this section. . .

(emphasis supplied).

In the case of the Lemon Law, the statute is violated when the manufacturer fails to refund the purchase price and the other recoverable amounts set forth in the statute after proper notice. It is for these amounts that a consumer may bring an action under § 218.0171(7).

Tammi's voluntary purchase of the vehicle prior to the conclusion of the lease was not caused by a violation of the statute. He was only obligated under the lease contract to make lease payments. His purchase of the vehicle and the early termination of the lease were voluntary acts and under no circumstances was Tammi obligated to pay the lease-end purchase price. The claimed violation of the Lemon Law did not cause Tammi to purchase the vehicle. He could have avoided incurring any costs related to the vehicle's purchase from the lessor by allowing the lease to terminate and returning the vehicle to the lessor. Instead, he chose to purchase the vehicle because he felt it was a good deal. Because he was given the choice, and was in no way obligated to purchase the vehicle, his voluntary purchase of the vehicle was not the

result of a violation of the Lemon Law. Any pecuniary loss must be cut off at the point where the claimed violation ceased to cause the loss. Because the purchase of the vehicle was in no way caused by a violation of the statute, it cannot be considered part of any damages, and therefore, cannot be doubled under subsection (7).

B. The Lease Agreement Is Only Relevant To The Extent That It Created A Financial Obligation Of The Consumer.

Tammi argues that his entire lease agreement is relevant to the court's statutory interpretation of damages. On the contrary, the lease agreement is relevant only to the extent that it obligates the lessee to make certain payments. Section 10 of the lease agreement, entitled "PURCHASE OPTION AT END OF LEASE TERM," provides:

> If you have fully performed all of your obligations under this Lease, including paying the total of your Monthly Payments and all other amounts due under this Lease, then you have an option to purchase the Vehicle AS IS at the end of the Lease Term for $64,344.10, plus any taxes, official fees and other charges related to such purchase. You must mail a notice of your decision to purchase the Vehicle to us by registered mail 45 days before the end of the Lease Term.

Under the above provision, purchase of the vehicle was not mandatory at the end of the lease, but rather an option

that the lessee could exercise as a separate transaction.[1] Furthermore, the lease contract utilized a standard lease agreement form and the option to purchase was not a unique bargained for benefit, but a standard lease agreement clause. Had the lease agreement required the purchase of the vehicle at the end of the lease, then the obligation of the lessee would be quite different. But Tammi, who admitted that by leasing he was able to take advantage of a tax benefit, voluntarily chose to enter into a lease agreement with the option to purchase, instead of outright purchasing the vehicle. Under these circumstances, the Lemon Law does not allow for recovery of the cost related to his voluntary purchase of the vehicle.

C. The Legislative History, Statutory Language, And Case Law Reflect That Leases And Purchases Are Separate And Distinct Transactions.

Tammi argues that because the Lemon Law was extended to protect lessees "to the same extent" as new car purchasers, that it is consistent to treat them equally under a Subsection (7) action. (Response Brief, p. 29). Porsche agrees to the extent that the Lemon Law protects consumers for the amount of their liability for whichever

---

[1] Tammi argues that he was damaged because he lost the benefit of being able to purchase the vehicle. He would have also lost this benefit if Porsche had taken the vehicle back and provided a refund within 30 days of the original Lemon Law notice.

initial transaction (purchase or lease) the consumer chooses.

Tammi fails to offer any insight regarding statutory construction and legislative history of the Lemon Law to support his position. His argument is essentially a regurgitation of the statute's revisions, and lacks any citations to the legislature's analysis or case law to evidence intent. He punctuates his recitation of the statutory language with the unsupported proposition that the revisions created "essentially identical" rights for lessees and purchasers, but ignores the fact that the legislature created separate and distinct provisions for lease transactions.

From the statute's legislative history, it is clear that the initial version of the Lemon Law Statute did not directly address the situation of leased vehicles. In fact, there was initially some question as to whether the statute was even applicable to leased vehicles. The legislature amended the Lemon Law in 1987 to specifically address the situation of leased vehicles, but in lieu of adopting the statutory damage scheme for vehicle purchases, the legislature crafted a separate and distinct statutory remedy for lease transactions and set it forth in § 218.0171(2)(b)3.

Such remedy is different, and in direct contrast to, the remedy provided to purchasers of a motor vehicle. If, as Tammi contends, the remedies are the same, then why did the legislature see fit to create a separate remedy scheme for lease situations? The reason is clear: the legislature recognized that leases and purchases are distinct transactions that must be treated differently. The fact that Tammi is unable to cite any authority for the proposition that the statutorily created remedies for lease and purchase situations are the same is further evidence of the erroneous interpretation postulated by Tammi.

The conclusion that the statutory damage remedies in a lease versus purchase transaction are different is supported by the following Legislative Reference Bureau analysis of the eventual Assembly Bill that became law:

> Currently the law governing repair, replacement and refund under a motor vehicle warranty, commonly called the "lemon law", provides remedies for a motor vehicle owner or a person who may enforce a motor vehicle warranty. This bill extends the remedies available under the "lemon law" to a person who leases a motor vehicle under a written lease.
>
> The bill describes the remedies available to lessees and to other consumers. With respect to a leased motor vehicle with a nonconformity which cannot be repaired, a manufacturer must accept return of the

> motor vehicle, refund the current value of the lease to the motor vehicle lessor and other security interest holders, and refund to the consumer the amount paid under the lease plus sales tax and collateral costs, minus a reasonable allowance for use. The bill specifies the method of calculating the current value of the lease and the reasonable allowance for use.
>
> With respect to any other motor vehicle with a nonconformity which cannot be repaired, the manufacturer must, as under current law, accept return of the motor vehicle and either replace it or refund the full purchase price plus any sales tax, finance charge, amounts paid at sale and collateral costs associated with the repair, minus a reasonable allowance for use.
>
> This bill permits a motor vehicle lessor, like a motor vehicle purchaser, to recover damages caused by certain violations of the "lemon law". A prevailing motor vehicle lessor may recover twice the amount of any pecuniary loss, costs, disbursements and reasonable attorney fees and any appropriate equitable relief.

1987 Wisconsin Act 105 (emphasis supplied).

These different procedures and remedies were a recognition by the legislature that in a vehicle purchase situation the consumer owns the vehicle, while with a lease the consumer has no ownership interest, only a contractual right to use the vehicle. Since a lessee may only demand a refund of what he or she has been obligated to pay under the lease, it cannot control the lessor's ownership

interest, nor does it have any right thereto. Accordingly, contrary to Tammi's assertion, a lessee and purchaser must have different remedies under the Lemon Law. When an action is brought for a statutory violation, the lessee is entitled to recover the amount he is obligated to pay under the written lease. The current value of the lease, which includes the residual value of the vehicle, is not pecuniary loss sustained by the consumer. Accordingly, by definition the amounts recoverable by a consumer in a lease situation do not include the vehicle's full purchase price.

The case law is also in accord with Porsche's interpretation. Tammi cites to ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 973, 542 N.W.2d 148 (1994) as supportive of his position that the purchase price is always included as part of a consumer's damages in a Lemon Law claim. ***Hughes*** is clearly distinguishable from this case because it involved a purchase as opposed to a lease. ***Hughes*** did not interpret the amount of damages recoverable by a consumer who leased a motor vehicle. Moreover, ***Hughes*** stands for the proposition that, upon proof of a violation, a consumer's pecuniary loss is measured by the amounts to which the consumer was entitled to under the refund portions of § 218.0171(2)(b), Wis. Stats. In the case of a purchase, this includes the purchase price. In the case of

a lease, these pecuniary losses would be measured by the amounts set forth in §218.0171(2)(b)3. As previously indicated, by statute, such pecuniary loss does not involve the remaining value of the written lease, i.e., the residual value of the vehicle. ***Hughes*** cannot be interpreted to support some different damage recovery in a lease situation than the one clearly set forth in the statute.

Tammi further claims that the purchase price at the end of the lease must be included in order to give a consumer the incentive to bring a lawsuit. However, the incentive to bring suit is a result of the consumer's pecuniary loss being doubled, ***Hughes v. Chrysler Motor Corp.***, 197 Wis. 2d 973, 542 N.W.2d 48 (1994), n. 2, as well as the availability of attorney's fees. Awarding damages for the voluntary purchase of a leased vehicle results in punishing the manufacturer because it awards the consumer more than a consumer paid or owed under the lease. This is not, and has never been, the intent of the statute.

Tammi is unable to cite any appellate authority, legislative history or case law from other jurisdictions to support his claim that the amount he voluntarily paid to purchase the vehicle near the conclusion of the lease is recoverable damage under the statute. In fact, the only

Wisconsin appellate decision directly on point is the Wisconsin Court of Appeals decision in the ***Estate of Riley v. Ford Motors Co.***, 248 Wis. 2d 193, 635 N.W.2d 635 (Ct. App. 2001), *rev. denied*, 643 N.W.2d 94, 250 Wis. 2d 557 (2002). Tammi asserts that ***Riley*** is distinguishable because certain facts were not a part of the opinion, including when the lemon law demand was made, whether all payments were made under the lease, etc. However, none of these facts were at all relevant to the court's holding that pecuniary loss does include the termination value of the vehicle's lease. The court's interpretation of the statute did not turn on any of those factors, but rather on its interpretation of the damage remedies provided by the statute in a lease situation. There is nothing in the opinion which suggests that any of the factors cited by Tammi would have altered the Court of Appeals' interpretation of the statute.

As a final attempt to distinguish ***Riley***, Tammi argues that ***Riley*** stands for the proposition that the purchaser of a motor vehicle or a consumer leasing a motor vehicle is entitled to recover as part of his pecuniary loss what is actually paid for the motor vehicle. (Response Brief, pp. 30-31). It is difficult to understand how one can reach

this conclusion from the following portion of the court's decision:

> When the consumer brings an action in court, he or she is limited to the remedies under §218.0171(7). This section does not mention the current value of the written lease. The consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out that amount of money. The lessor (and/or holder) owns a leased vehicle and, if it is a lemon, the lessor owns a lemon. When the consumer chooses a refund, he or she must return the vehicle to the manufacturer; therefore, the lessor does not have the vehicle and must be compensated for the value of the vehicle.

Estate of Riley v. Ford Motor Co., 248 Wis. 2d 193, 635 N.W.2d 635 (Wis. Ct. App. 2001).

Riley stands for the proposition that the termination value of the lease, i.e., residual or buy-out amount, is not a consumer's pecuniary loss caused by a statutory violation. Unlike a purchaser, by signing the lease, the consumer receives a contractual option to purchase the vehicle or return it. Because of any statutory violation, the consumer is never out any additional amount that was voluntarily paid to exercise the purchase option under the lease. Unlike a purchaser, the consumer is never required to pay the buyout amount in a lease situation.

D. Return Of The Motor Vehicle In A Subsection (7) Action Presents No Different Scenario Than The Return Of The Vehicle Under Other Subsections Of The Lemon Law.

Nowhere does Tammi address Porsche's argument that a consumer retaining possession of the vehicle after receiving damages for the vehicle's residual value would amount to triple damages. Tammi simply fails to cite any legal authority, law review article or other authority for the proposition that a consumer is not required to return the nonconforming vehicle. Tammi further claims that the legislature should have included specific language in the statute if the vehicle is to be returned. In fact, the legislature did so when it limited recovery to the pecuniary loss caused by the statutory violation. After being reimbursed for the purchase price or lease payments and receiving double damages, the remaining value of the nonconforming vehicle is not pecuniary loss sustained by the consumer. The consumer has been made whole upon the refunding of the amounts set forth in the statute. No public policy is furthered by the consumer retaining possession of a vehicle that was determined to be a lemon.

Tammi suggests that a lack of guidance for returning a vehicle under a subsection (7) action will create pandemonium and additional litigation. However, nowhere in

the Lemon Law does it specify a step by step process by which a consumer is to return a vehicle deemed a lemon. Wis. Stat. § 218.0171(2)(cm)1. states that a manufacturer has 30 days to provide a refund to a consumer who has offered to return the vehicle. After the refund has been provided, "the consumer shall return the motor vehicle having the nonconformity to the manufacturer." *Id.* The statute does not provide a detailed set of instructions for doing so. Return of a vehicle under Wis. Stat. § 218.0171(2)(cm)1. is no different than return of a vehicle under § 218.0171(7). Despite this "lack of guidance" there have been no reported cases where problems related to the return of the vehicle were at issue.

Tammi also asserts that return of the vehicle to the manufacturer does not further the purpose of the statute. Per the plain provisions of the statute and this court's decisions, the purpose of the Lemon Law is not only to compensate those actually harmed by the sale of a lemon, but to protect subsequent consumers as well.[2] To allow

---

[2] All vehicles returned to the manufacturer under the statute must have the title branded. Wis. Stat. § 218.0171(2)(d). In addition, 1993 Wisconsin Act 63 (Wisconsin's "Title Branding Law") defines situations where disclosure is required. 1993 Wisconsin Act 63 created Wis. Stat. § 340.01(28e) defining "manufacturers buyback vehicle" as a vehicle having a nonconformity under s. 218.0171, making clear a manufacturer's

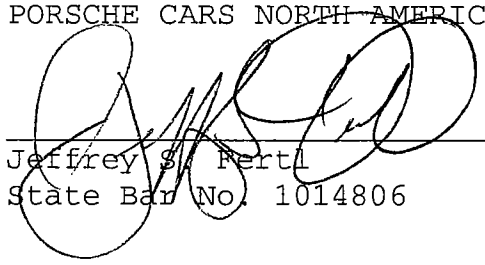
consumers to keep the vehicle and potentially convey it to another consumer without the required notice is contrary to the purposes of the statute. The manufacturer, not the consumer, has the most incentive and resources to notify any subsequent purchasers of the vehicle's status.

II. CONCLUSION.

For the foregoing reasons, Porsche requests that the certified questions be answered in accordance with the arguments and conclusions set forth in its principal brief.

Date: November 19, 2008

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant,
PORSCHE CARS NORTH AMERICA, INC.



Jeffrey S. Fertl
State Bar No. 1014806

P. O. ADDRESS:

100 E. Wisconsin Ave.,
#2600
Milwaukee, WI 53202
414-276-6464

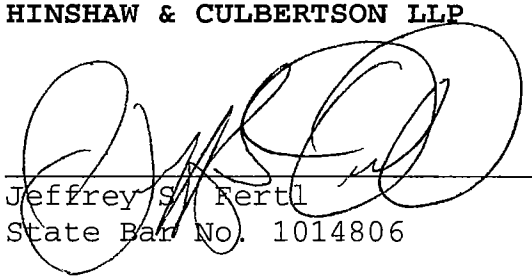
obligation to brand the title of a vehicle found to be a lemon.

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), Stats., for a brief produced using the following font: Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 2,974 words.

Dated: November 19, 2008.

HINSHAW & CULBERTSON LLP



Jeffrey S. Fertl
State Bar No. 1014806

P. O. ADDRESS:

100 E. Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202
414-276-6464

SUPREME COURT OF WISCONSIN

BRUCE A. TAMMI,

Plaintiff-Appellee,

APPEAL NO.: 2008AP001913-CQ

vs.

PORSCHE CARS NORTH AMERICA, INC.,

Defendant-Appellant.

CERTIFIED QUESTIONS FROM SEVENTH CIRCUIT COURT OF APPEALS, APPEAL NO. 07-1832

NON-PARTY BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
703-264-5300
Of Counsel

Frank J. Daily
State Bar No. 1011065
Mitchell S. Moser
State Bar No. 1001476
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
414-277-5000

Attorneys for Non-party
Product Liability
Advisory Council, Inc.

The Product Liability Advisory Council, Inc. ("PLAC") submits this amicus brief pursuant to Wis. Stat. § 809.19 (7) to address the questions certified to the Wisconsin Supreme Court in this action. PLAC is a non-profit association of corporations representing a broad cross-section of American and international product manufacturers. A number of these corporate members are motor vehicle manufacturers that respond to breach of warranty and lemon law claims in the State of Wisconsin.

Among motor vehicle manufacturers, Wisconsin's lemon law is easily known to be the most aggressive and pro-consumer lemon law in the nation. Among the plaintiffs' bar and certain pockets of the Attorney General's office, Wisconsin's generous interpretation of substantial impairment, four repair attempts and 30 days out of service, as well as its stringent and unforgiving 30-day response periods, are hailed as the strongest of their kind in the nation.

On the manufacturers' side, some state in the nation has to have the broadest and most aggressive state lemon law, and if that state is Wisconsin, that is fine. But even within the broadest and most

aggressive lemon law in the nation, the courts still must interpret the limitations of the lemon law as written in the statute and as intended by the legislature. The Wisconsin lemon law is strong enough and threatening enough as written to persuade manufacturers to buy back vehicles that wouldn't even be near consideration for buybacks under other states' lemon laws.

At issue in this case is a string of four interrelated questions that are all based on a rather specific and rare set of facts involving a lessee's voluntary purchase of an alleged lemon vehicle not just after the first year of ownership, and not just after the making of a lemon law demand, but after the filing of a lemon law lawsuit itself. Under these facts, it is inconsistent with the structure and purpose of the lemon law to (1) include the voluntary buyout payment in the calculation of pecuniary losses under the lemon law, then (2) double that amount under the statute and then (3) allow plaintiff to keep ownership of the vehicle after the case is concluded.[1]

[1] Also at issue is whether any damage award is subject to a reduction for reasonable use. Because of the space constraints for this brief, PLAC will leave this argument to Porsche.

ARGUMENT

I. PLAINTIFF'S VOLUNTARY PURCHASE OF THE VEHICLE AT ISSUE AS THE END OF THE LEASE APPROACHED (AND WHILE THE LAWSUIT WAS PENDING) CANNOT BE CONSIDERED "PECUNIARY LOSSES" UNDER THE LEMON LAW.

Although there are four separate questions certified to this Court, each successive question builds on the Court answering the prior question affirmatively. Stated another way, all four questions relate back to the same critical fact in this case -- that plaintiff voluntarily elected to buyout the remainder of his lease and purchase the subject vehicle while the matter was in litigation.

To the outsider, it seems odd that an individual saddled with the angst of having a lemon vehicle [one purpose of the lemon law is to "reduce the inconvenience, the expense, the frustration, the fear and [the] emotional trauma that lemon owners endure," Hughes v. Chrysler Motor Corp., 197 Wis. 2d 973, 982, 542 N.W.2d 148, 151 (1996)] would actually want to purchase the involved lemon vehicle. This oddity highlights how rare of a factual scenario this case

involves. Still, the statutory language and the underlying purposes of the statute indicate that this voluntary purchase of the vehicle cannot be part of the pecuniary loss in the case.

Under the statute's plain language, customers are entitled "to recover for any damages caused by a violation" of the statute. Wis. Stats. § 218.0171(7). Here, plaintiff's attempt to expand his "pecuniary loss" by voluntarily purchasing the vehicle during the litigation adds a potential damages category that was in no way "caused by a violation" of the statute. What if, during the pendency of a lemon law lawsuit, a plaintiff decided to upgrade his or her vehicle by installing a state of the art, souped-up engine? If such a new engine costs $25,000, should plaintiff's pecuniary loss increase by $25,000? Of course not; such a voluntary modification to the vehicle after the lemon law notice has been given is not a loss that is "caused by a violation" of the lemon law. While a vehicle owner may want to install such a $25,000 engine after giving a lemon law notice, such an expense could not be added to the plaintiff's "pecuniary loss" because it had nothing to do with the manufacturer's assumed

violation of the lemon law. Similarly, based on the plain terms of the statute, the voluntary purchase of a vehicle during the litigation is not a "pecuniary loss" caused by the lemon law violation.

Lemon law case law supports such a statutory interpretation. As this Court has stated, the purpose of the lemon law is "to improve auto manufacturers' quality control. . . [and] reduce the inconvenience, the expense, the frustration, the fear and [the] emotional trauma that lemon owners endure." Hughes, 197 Wis. 2d at 982, 542 N.W.2d at 151. "Its principal motivation is not to punish the manufacturer. . .[but rather is] to provide an incentive to that manufacturer to promptly return those unfortunate consumers back to where they thought they were when they first purchased that new automobile." Id. at 985-86, 542 N.W.2d at 152-53.

The Court of Appeals has addressed the lease buyout value issue in Estate of Riley v. Ford Motor Co., 2001 WI App 234, 248 Wis. 2d 193, 635 N.W.2d 635. In Riley, after stringently interpreting the 30-day deadline for repurchase by ruling that the 30-day period cannot be extended and by ruling the refund must be in the

consumer's hand, the Court went on to address whether in a lease situation, the current value of the written lease should be included as a "pecuniary loss" when awarding damages to a plaintiff. The Riley court ruled that

> When the consumer brings an action in court, he or she is limited to the remedies under § 218.015(7). This Section does not mention the current value of the written lease. The consumer's pecuniary loss does not include the termination value of the vehicle because the consumer is not out that amount of money. The "lessor" (and/or holder) owns a leased vehicle and, if it is a lemon, the lessor owns a lemon. When the consumer chooses a refund, he or she must return the vehicle to the manufacturer; therefore the lessor does not have the vehicle and must be compensated for the value of the vehicle.
>
> The trial court erred when it awarded Riley $23,221.95, which the court found to be the current value of the written lease.

2001 WI App 234, ¶¶ 12-13.

While this Court has not addressed the issue of "pecuniary loss" in lease transactions, it did address the calculation of pecuniary loss in vehicle purchase situations in the Hughes case. There, this Court ruled that "pecuniary loss" in a vehicle finance situation would

include the entire purchase price of the vehicle as it does in situations where the vehicle is purchased outright with no financing. What concerned the Court in Hughes was the potential disparate treatment between individuals who purchased their vehicle outright as opposed to those who financed the purchase. With a financed purchaser, the Hughes court was concerned that the pecuniary loss would be no better remedy than under a breach of warranty or Magnuson-Moss claim; would not incentivize a manufacturer to repurchase vehicles; and would not incentivize financed purchasers to make lemon law claims. As a result, this Court included the full purchase price of the vehicle when calculating damages in a financed purchase situation.

A lease transaction is entirely different than a purchase transaction (whether financed or fully paid) for virtually all aspects of vehicle ownership, and the lemon law recognizes this by handling the two types of situations differently. A lessee does not "own" the vehicle, but rather is really only "renting" it. The vehicle is owned by the lessor who retains title to the vehicle. As a result, when a lemon law claim is made, a replacement vehicle is not even available - only a

refund is. The repurchase of the vehicle must necessarily involve the lessor based on control over the title. These distinct differences, which are consistent with the lemon law handling lessees differently than it does purchasers, support applying the Riley rationale to this case.

Really what is at issue here is nothing more than the basic requirement of mitigation of damages. It has long been the law in Wisconsin that an injured party must take all reasonable steps to mitigate damages. Handicapped Children's Education Bd. v. Lukaszewski, 112 Wis. 2d 197, 332 N.W.2d 774 (1983). Stated another way, an injured party must use reasonable measures to avoid or minimize damages, and cannot recover items which could have been avoided. Kuhlman v. G. Heilman Brewing Co., 83 Wis. 2d 749, 266 N.W.2d 382 (1978). Wisconsin's jury instructions state that a plaintiff may not recover losses that plaintiff knows or should have known could have been reduced by reasonable efforts. Wis. JI-Civil § 1731.

Here, plaintiff filed a lemon law demand claiming that his vehicle is a lemon. But once Porsche had failed to buy back the vehicle within the 30-day lemon law period, plaintiff was aggrieved (assuming he had a lemon) and was entitled to file a lawsuit. With that aggrieved status, however, came the duty to mitigate damages, the duty to take reasonable measures to avoid or minimize *future* damages. By voluntarily buying out the remainder of his lease during the pendency of the litigation, plaintiff not only failed to take reasonable measures to avoid or minimize damages, he actively took steps which, by his own calculations, would result in an increase in his damages by that buyout amount (and then *doubling* that amount). This action is the clear opposite of mitigation of damages.

The case of Muth v. Frost, 68 Wis. 425, 32 N.W. 231 (1887) is instructive. In Muth, a homeowner had his roof repaired by the defendant, and the repairs were inadequate. The roof was blown off the house, which lead to additional repairs which still did not remedy the leaking. Plaintiff was successful in suing on the poor workmanship on the roof. When plaintiff asked for recovery of

damages for harm to machinery that was kept in the barn after the roof repairs, the Court swiftly denied such recovery. Because plaintiff knew that the blown off (but repaired) roof still had leaking issues, he could not continue to store his machinery under that roof and then claim damages to the machinery. Id. at 428, 32 N.W. at 233. Because damage to the machinery could have been avoided, the requirement of mitigation of damages barred the recovery.

Here, plaintiff is asking for his $75,621.88 buyout of the vehicle (and then is asking that amount to be doubled!) as part of his pecuniary loss. Could this $150,000 in damages have been minimized or avoided? Easily. Therefore should it be an element of pecuniary loss in this case? Clearly not. This is not to say that plaintiff should lose the opportunity to purchase his lemon vehicle, if that is really what he wants to do. But, consistent with the plain language of the statute, the legislative purposes behind the statute, and the duty of mitigation, if plaintiff voluntarily elects to buy out the rest of his lease, that buyout payment cannot be a part of plaintiff's pecuniary loss.

This Court in Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis. 2d 670, 610 N.W.2d 832 addressed the issue of whether its decision on a case could cause "fortune hunters" to try to abuse the lemon law. While the Court in Dieter ruled that consumers who are aware of defects in the vehicle before they purchased the vehicle could still bring lemon law claims without the risks of "fortune hunters" trying to abuse the lemon law (Id. at ¶ 26), a decision that would enable lessees to automatically and voluntarily increase their "pecuniary loss" by buying out the lease during litigation would undoubtedly open the door to "fortune hunters."

The voluntary buyout of a leased vehicle cannot constitute a pecuniary loss under the express language of the statute, the purposes behind the statute or under principles like mitigation of damages. As addressed in Porsche's brief, the issue of doubling the pecuniary loss is basically intertwined with whether the lease buyout amount can constitute a pecuniary loss. For the same reasons identified above, that amount should not be considered a pecuniary loss and in no event should be doubled.

II. WHEN A MANUFACTURER IS FOUND TO VIOLATE THE LEMON LAW, UNDER THESE FACTS OR IN GENERAL, PLAINTIFF SHOULD NOT BE ENTITLED TO KEEP THE LEMON VEHICLE AFTER RECEIVING DOUBLE DAMAGES UNDER THE STATUTE.

The Wisconsin lemon law has just celebrated its 25th birthday, and after two decades of manufacturers (sometimes) losing lemon law cases, paying double damages and receiving the lemon vehicle back at the end of the case, a federal district court would now suggest that a winning lemon law plaintiff should also be able to keep the court-adjudicated "lemon" vehicle. There is no basis for such a ruling in the history or text of the lemon law.

The Eastern District's ruling relied on a common lemon law fallacy -- that any additional damages a court can place on a manufacturer must have the beneficial impact of making manufacturers more obedient in buying back vehicles. It is easy to say "the worse the consequence to the manufacturer, the more incentive provided." But the incentives given to the manufacturer cannot outpace the written limitations of the statute, and should not constitute a punishment to the manufacturer as per Hughes. Would a

finding of 10 times damages instead of double damages further incentivize manufacturers to buy back every vehicle, regardless of the strength of the demand? Certainly. But ten times damages are not authorized by the legislature and exceed the scope of what is permissible under the lemon law. Simply adding more damages against the manufacturer is not necessarily consistent with the statute's language or intent.

The remaining basis of the Eastern District's ruling was that nothing in the lemon law explicitly prohibited the court from awarding plaintiff the vehicle. This is something of a "glass half empty" argument, because the opposite is equally true: nothing in Section 7 of the statute specifically *allows for* an aggrieved plaintiff to keep the lemon vehicle after successfully prevailing in a case. In fact, a host of reasons govern against plaintiff retaining ownership of the vehicle at the end of a successful lemon law case. The entire basis for the lemon law is to get the aggrieved plaintiff out of ownership responsibility for a lemon vehicle. This is why the world must stop for 30 days when a consumer makes a lemon law demand and why

one of the very few requirements placed on a consumer is that they actually offer to transfer title of the vehicle to the manufacturer in making a lemon law demand. Garcia v. Mazda Motor of Am., Inc., 2004 WI 93, 273 Wis. 2d 612, 628 N.W.2d 365. The entire essence and purpose of the lemon law is to get the consumer out of the vehicle and to put them back where they were before they had purchased the vehicle. If a plaintiff prevails on a lemon law claim they are entitled to double damages and attorney's fees, which the legislature considered to be ample encouragement for manufacturers to repurchase vehicles when appropriate. But the concept that a plaintiff might actually want to keep a lemon vehicle (or voluntarily buyout the remainder of a lease to purchase a lemon vehicle) runs contrary to the essential underpinnings of the statute. The Eastern District's doing so, for what is believed to be the first time in the 25 year life of the statute, smacks of the kind of punishment that this Court indicated was inappropriate in Hughes.

CONCLUSION

This Court should rule that the amounts spent to buyout the remainder of the lease and purchase the car during the pendency of the lawsuit cannot be considered a "pecuniary loss" under the Wisconsin Lemon Law, and in no event should be doubled. Furthermore, consistent with the underlying purposes and process of the lemon law, a prevailing lemon law litigant should not receive, in addition to double damages, continued possession of the lemon vehicle at issue.

Dated this 18th day of November, 2008.

Hugh F. Young, Jr.
Product Liability Advisory
Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
703-264-5300
Of Counsel

Frank J. Daily
State Bar No. 1011065
Mitchell S. Moser
State Bar No. 1001476
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
414-277-5000

Attorneys for Non-party
Product Liability
Advisory Council, Inc.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2996 words.

Mitchell S. Moser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing brief are being served upon the following parties by prepaid United States Mail on the 18th of November, 2008:

Bruce A. Tammi
Law Office of Bruce A. Tammi
405 E. Lincoln Avenue
#2600
Milwaukee, WI 53207-1718

Jeffrey S. Fertl
Hinshaw & Culbertson LLP
100 E. Wisconsin Avenue

Milwaukee, WI 53202-4124

Mitchell S. Moser