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DISTRICT II

July 6, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2503 John B. Lemke v. FCA US, LLC
(L.C. # 2014CV828)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

John B. Lemke and JBL Trucking, LLC (collectively JBL), appeal from an order granting the motion of FCA US, LLC, for summary judgment dismissing JBL's complaint alleging a violation of Wisconsin's Lemon Law, *see* WIS. STAT. § 218.0171 (2011-12),[1] and denying JBL's motion for summary judgment on its complaint. Based on our review of the briefs and the record, and in light of our court's recent decision in ***Klismet's 3 Squares Inc. v. Navistar, Inc.***, 2016 WI App 42, ___ Wis. 2d ___, ___ N.W.2d ___, we conclude that this case is appropriate for summary disposition and reverse the order. *See* WIS. STAT. RULE 809.21 (2013-14).

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

On August 8, 2013, JBL purchased a 2013 Dodge Ram 4500 pickup truck from Uptown Motorcars, Inc., financing the purchase through Chrysler Group, LLC. The truck came with a factory warranty for three years or 36,000 miles, and JBL purchased an extended warranty that covered the truck for five years or 200,000 miles.

It is undisputed that JBL's vehicle was a "lemon" as defined in WIS. STAT. § 218.0171(1). Within thirty days of having received JBL's notice claiming relief under the Lemon Law, FCA agreed to repurchase the truck and determined that, after FCA paid off the outstanding loan balance, JBL was owed a refund of $13,154.54. In reaching that figure, FCA deducted $9030.61 for "a reasonable allowance for use" of the truck under its interpretation of § 218.0171(2)(b)2.b. This figure constituting the "reasonable allowance for use" was reached by multiplying the purchase price ($46,190) by the fraction of the number of miles driven at the time JBL first complained (19,551) over 100,000, i.e., $46,190 x 19,551/100,000 = $9030.61. ***Id.***

JBL objected to the "reasonable allowance for use" calculation, asserting that under WIS. STAT. § 218.0171(2)(b)2.b., the denominator should not be 100,000 but 200,000, representing the number of miles warranted under the extended warranty JBL had purchased. FCA refused to alter its calculation, countering that the 100,000 figure was "per the statute" and, thus, "correct." However, in the interest of resolving the matter, FCA offered to reduce the use allowance calculation to $7500. JBL refused to accept FCA's offer. FCA sent a refund check to JBL for $12,685.15, which incorporated the use allowance calculation of $7500, using that figure "as a gesture of good will." JBL rejected the check, writing "void" over it and returning it to FCA. After continued exchanges between the parties, JBL commenced this action against FCA.

The parties then made competing motions for summary judgment, each asserting that its interpretation of WIS. STAT. § 218.0171(2)(b)2.b. was correct.

As relevant, the circuit court granted summary judgment to FCA on JBL's claim under the Lemon Law, agreeing that FCA's interpretation of WIS. STAT. § 218.0171(2)(b)2.b. was correct. As such, the circuit court dismissed JBL's complaint.

If a consumer offers to return a vehicle in exchange for a refund, the manufacturer is required to pay the consumer, under WIS. STAT. § 218.0171(2)(b)2.b., as follows:

> 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.

Recently, our court interpreted WIS. STAT. § 218.0171(2)(b)2.b. and concluded that "the statutory language makes clear that the formula is a ceiling and not a fixed amount." ***Navistar***, ___ Wis. 2d at ___, ¶25. In ***Navistar***, the parties disputed the amount of a refund offered for a lemon automobile the plaintiff purchased, including the calculation of the reasonable allowance for use of the vehicle. ***Id.***, ¶4. After a trial to the circuit court, the court concluded that a denominator of 100,000 was not reasonable and that 300,000 was reasonable. ***Id.***, ¶8. On appeal, we found it "significant" that § 218.0171(2)(b)2.b. used the term "reasonable." ***Navistar***, ___ Wis. 2d at ___, ¶24. Our supreme court, we noted, had said that "'reasonable allowance for use' is not a precise term." ***Id.*** (quoting ***Tammi v. Porsche Cars N. Am., Inc.***, 2009 WI 83, ¶55, 320 Wis. 2d 45, 768 N.W.2d 783). In addition, the Seventh Circuit had persuasively "elaborate[ed] that '[t]hese are the very types of cases in which the 'not inflexible' nature of the ceiling lends itself to negotiation." ***Id.***, ¶24 (quoting ***James Michael Leasing Co., LLC v. PACCAR Inc.***, 772 F.3d 815, 823 (7th Cir. 2014)).

The ***Navistar*** court found that the statutory language of WIS. STAT. § 218.0171(2)(b)2.b., which states that "a reasonable allowance for use may not exceed the amount" obtained by

utilizing the formula, "makes clear that the formula is a ceiling and not a fixed amount." ***Navistar***, ___ Wis. 2d at ___, ¶25. The statute's use of the words "may not exceed" could not "be ignored without reducing part of the statutory language to superfluity." ***Id.*** Again, pointing to ***Tammi***, we noted that "[o]ur supreme court has recognized that the formula creates a 'ceiling on the amount that may be deducted as 'a reasonable allowance for use' from a refund of the full purchase price.'" ***Navistar***, ___ Wis. 2d at ___, ¶25 (quoting ***Tammi***, 320 Wis. 2d 45, ¶35). Therefore, we concluded that "the plain meaning of the statute is that a 'reasonable allowance for use' should be an amount that is both reasonable and that does not exceed the ceiling imposed by the formula." ***Id.***, ¶26.

In ***Navistar***, the circuit court had concluded that 300,000 was the proper denominator based on testimony in the record that the vehicle, before overhaul, would have "a useful life … of at least 300,000 miles and, if properly maintained, of at least 500,000." ***Id.***, ¶¶28-29. Since the circuit court's determination was based on record evidence, it was reasonable, and the reasonable allowance-for-use figure did not exceed the ceiling imposed by the formula in the statute. Thus, "the circuit court applied a legal standard derived from the plain meaning of the statutory language and utilized appropriate facts in the record to arrive at its conclusion." ***Id.***, ¶32. As such, we affirmed the circuit court's determination.

Based on our holding in ***Navistar***, the circuit court erred in granting summary judgment to FCA. The circuit court erroneously interpreted WIS. STAT. § 218.0171(2)(b)2.b., concluding that the 100,000 denominator is fixed and not variable. The parties submitted competing evidence as to whether 100,000 or 200,000 or possibly some larger number was the appropriate denominator. In light of that competing proof, a factual issue exists that must be resolved by the fact finder. *See* WIS. STAT. § 802.08(2) (2013-14); *see generally* ***Church v. Chrysler Corp.***, 221 Wis. 2d 460, 471, 585 N.W.2d 685 (Ct. App. 1998).

Accordingly, the order is reversed and the motion of FCA for summary judgment dismissing JBL's complaint is denied.

IT IS ORDERED that the order is summarily reversed and the motion of FCA for summary judgment dismissing JBL's complaint is denied. *See* WIS. STAT. RULE 809.21 (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals