

NO. A11-581

State of Minnesota
In Supreme Court

Marie Delores Green,

Respondent,

vs.

BMW of North America, LLC, a foreign limited liability
 company qualified to do business in the State of Minnesota,

Appellant.

BRIEF OF AMICUS CURIAE, CHRYSLER GROUP, LLC

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STATEMENT OF THE ISSUES

I. Did the District Court Abuse its Discretion by Concluding to Be Reasonable the Billing Practices and Hourly Rates of Plaintiff's Counsel In This Lemon Law Case?

The trial court held that both the billing practices and hourly rate of plaintiff's counsel were reasonable.

Apposite Cases:

Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008);
Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988);
Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986); and
State v. Paulson, 188 N.W.2d 424 (Minn. 1971)

Apposite Statutes:

Minn. Stat. §325F.665 *et. seq.* (2011)

STATEMENT OF THE CASE

Chrysler Group LLC adopts the statement of facts and the statement of the case contained in Appellant's brief.

STATEMENT OF *AMICUS CURIE*

Chrysler Group LLC (Chrysler Group) submits this *amicus curie* brief requesting that the decision of the Minnesota Court of Appeals be reversed.¹

Chrysler Group is one of the three largest automobile manufacturers in the United States. Because of the volume of automobiles sold in Minnesota, it has been unavoidable that Chrysler Group has been a defendant in dozens of lemon law cases in which Appellee's counsel represented the consumer. Chrysler Group brings to the table on this important issue valuable and important perspectives, generally, on the state of lemon law litigation over the past 15 years. It submits that an appropriate analysis from this Court is necessary to level the playing field in all good faith consumer law disputes, and hopes that clarification from this Court will further that goal.

Chrysler Group agrees with the positions and arguments put forth by Appellant BMW in its brief. Chrysler Group submits this *Amicus* brief to also focus the Court's attention on the billing practices of plaintiff's counsel prior to and in the early stages of litigation, and it asks that the Court's opinion in *Green v. BMW* offer specific guidance on what constitutes reasonable billing practices which, to this point, have hindered the ability to fairly resolve lemon law cases in the early stages.

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Pursuant to Minn. R. Civ. App. P. 129.03, Chrysler Group LLC states that no other party made a monetary contribution or aided in the preparation or submission of this *amicus curiae* brief.

STANDARD OF REVIEW

Chrysler Group LLC adopts the standard of review as submitted by Appellant BMW.

ARGUMENT

“[In evaluating a fee petition], a trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful. But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award of attorney's fees just as he would bear the burden of proving the claim for any other money judgment.”²

When a plaintiff's attorney seeks to recover under a fee-shifting statute, it is incumbent upon him or her to use appropriate “billing judgment”, and to bill no differently than if counsel's client were the one paying the bill. As noted in Judge Johnson's dissent below, however, Appellee's attorneys here did not exercise appropriate “billing judgment.” See Add. 18.³ The trial court's abdication of its duty to scrutinize counsel's invoices only compounded the problem, as it simply “rubber stamped” these overreaching billing practices, the same practices that at least two other trial court judges have previously found to be suspect. See App. 31-45.

In enacting its lemon law, Minnesota Statute 325F.665, the Legislature provided in subdivision 9 that a party injured by a violation of the statute may seek to recover reasonable attorney fees. Notwithstanding the Legislature's intent to provide a means for aggrieved

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Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718-719 (5th Cir. 1974) overruled on other grounds, *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989).

³

All citation references with be to the Appellant's Appendix (App. XX) or Addendum (Add. XX).

consumers to secure representation, interpretations of this statutory fee-shifting provision in certain lower courts of this state (which, in fairness, have operated without significant guidance from our appellate courts) have resulted in the playing field being increasingly and unfairly tipped against manufacturers and in favor of opportunistic attorneys representing consumers.⁴ The consequences to manufacturers are especially unfair when a claim of unreasonably high fees thwarts a manufacturer's intent to settle at or near the very outset of the case.

While the present appeal involves a case that went to trial, its factual record is more than sufficient for this Court to analyze and provide guidance on what exactly constitutes reasonable attorney fees for the preliminary effort of representing a lemon law plaintiff. This record establishes a pattern of billing practices that Amicus has experienced first hand over the past decade in dealing with certain counsel representing consumers in lemon law and vehicle warranty cases. These counsel have created lucrative practices by claiming to have incurred several thousand dollars in attorney fees before a manufacturer-defendant is ever even informed of a lemon law claim. Counsel accomplish this by claiming unreasonable fees for preparing initial boilerplate documents such as the summons, complaint, and form interrogatories, as well as for reviewing initial case materials.

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Plaintiff's counsel in this case are seeking ten times the amount recovered by the plaintiff.

This practice is epitomized in this case where, at the time a settlement demand was presented but before any real discovery had taken place, claimed fees were already over \$5,400. (App. 1). The record demonstrates that Appellee's counsel manufactures these high fees by regularly billing two to three hours for drafting discovery requests and two to three hours for drafting summons and complaints that, as noted by Judge Denise Riley, are nearly identical and are used by the same firm with courts throughout this state.⁵ App. 1, 34, 49. Appellee's counsel here charged 1.3 hours to draft the Summons and Complaint, 2.5 hours to draft boilerplate discovery, and 3.1 hours to analyze vehicle repair documentation that, in this case at the time the Complaint was served, consisted of a mere eight repair orders totaling less than twenty five pages . App. 1, 72. Appellee's counsel then billed nearly an hour to analyze BMW's boilerplate answer. Id.

The result of such billing practices by plaintiff's counsel is that manufacturer-defendants, when initially presented with a settlement demand or initial pleadings, are routinely asked to pay \$4,000, \$5,000, \$6,000 and even \$7,000 in attorney's fees, separate and apart from the amount requested for the consumer. Indeed, it is not uncommon for the fee demand to exceed the amount demanded to settle the plaintiff's claim on the merits.

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Generating Complaints, Interrogatories and Requests for Production of Documents that are virtually identical to those served in hundreds of previous cases begs the question of why this work could not easily be accomplished by a junior lawyer or paralegal at a rate far less than \$375, with a brief review by supervising counsel to ensure accuracy. As noted by the Third Circuit: “[a] Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn.” *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3rd Cir.1983).

In an ever-burgeoning and highly lucrative stratagem, settlements in lemon law cases have been driven by these billing practices and subsequent unreasonable fee demands. While this practice has been greatly beneficial to the income of the consumer's attorneys, the unfortunate fact is that it has otherwise been detrimental to the parties and the courts because: (1) the plaintiff-consumer's settlement or recovery is delayed and (2) the limited resources of the state's trial courts are unnecessarily taxed in administering a case that the manufacturer would otherwise settle, especially if fee disputes must be litigated. Defendant manufacturers are left with a Hobson's Choice of either (a) settling the case by paying a manifestly unfair amount of fees early in a case, or (b) risk paying an even more inflated fee award after being so ordered by a trial court - - including (and perhaps most unfairly) an award of additional fees for litigating the fee dispute.⁶ The latter has occurred primarily because trial court judges, lacking guidance from this Court, have too often been reluctant to appropriately scrutinize the billing practices of plaintiff's counsel.⁷

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This predicament actually provides certain consumer counsel with an incentive to not reduce their fees as part of settlement talks, as trial courts routinely award attorney fees for seeking to recover fees, even if the amount requested in a fee petition is ultimately reduced by the court. Chrysler Group submits that if a trial court finds that a consumer lawyer has sought an unreasonably high amount of fees, then that lawyer should be precluded from any additional award of fees.

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See Appellant's Brief at 31-34, discussing opinions in which two trial court judges found the billing practices suspect and cut counsel's bills dramatically, while two others awarded the full amount and endorsed the identical billing practices as reasonable.

Accordingly, Chrysler Group believes that an important issue to this appeal is whether the fee-shifting provision of the lemon law should be construed as intended by the legislature to provide open access to the courts for consumers, or should be expanded to provide a mechanism to generate unearned financial windfalls to overreaching plaintiff's attorneys at the expense of defendant manufacturers. See *Shepard v. St. Paul*, 380 N.W.2d 140, 143 (Minn. App. 1985)(legislative intent in fee-shifting statutes is "to provide a reasonable fee . . . that is adequate to attract competent counsel without producing a windfall to attorneys.")

The clearly unintended result of this flawed system has been, and continues to be, an environment where plaintiff's counsel, in effect, hold settlements hostage by steadfastly demanding exorbitant attorney fees. This creates obstacles to what should be the mutual, primary goal of all parties: To resolve the consumer's case early in the process for a fair settlement value. Over the past decade, Appellee's law firm has been able to use the lemon law statute as a mechanism to enrich its bottom line, with no additional benefit to their clients, at the expense of a manufacturer's right to settle cases at the outset for a fair amount. This mechanism has had tacit judicial endorsement over the years, because many trial courts that have addressed fee disputes with Appellee's counsel and manufactures such as BMW and Chrysler Group have done so without appropriately analyzing and, yes, scrutinizing these fee petitions. Unfortunately, this has created a catalog of trial court opinions that counsel for Appellee routinely submit to subsequent trial courts in support of their exorbitant fee

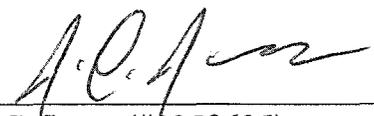
requests. This Court should now address and repair this system to ensure that it works fairly to benefit all parties and not merely plaintiff's lawyers.

CONCLUSION

This appeal affords this Court the opportunity to remedy the vacuum of guidance currently available to trial courts regarding the correct application of the lemon law fee-shifting provision. It allows the Court to provide clear directives on what constitutes "reasonableness" in billing judgment for consumer's counsel when representing a client that will never have to pay any attorney fees. Chrysler Group joins in the arguments of Appellant regarding reasonableness and proportionality, but adds that this appeal presents the Court with an important opportunity to address the pattern of unreasonable billing practices that hinder legitimate settlement opportunities of lemon law cases in the early stages of litigation. Accordingly, Chrysler Group asks the Court to provide specific guidance to trial courts for addressing exactly what are appropriate billing practices in the early stages of a lemon law case.

Dated: April 6, 2012

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, suds, 1 and 3, for a brief produced with a proportional font. The length of this brief is 1858 words. This brief was prepared using WordPerfect 12.

Dated: April 6, 2012

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