

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

DARREN BERRY, ET AL.

Respondents

v.

VOLKSWAGEN GROUP OF AMERICA, INC.

Appellant

DOCKET NUMBER WD73974

DATE: June 12, 2012

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Michael W. Manners, Judge

Appellate Judges:

Division One
Cynthia L. Martin, P.J., Thomas H. Newton, and Karen King Mitchell, JJ.

Attorneys:

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

DARREN BERRY, ET AL., Respondents, v.
VOLKSWAGEN GROUP OF AMERICA, INC., Appellant

WD73974

Jackson County

Before Division One Judges: Cynthia L. Martin, P.J., Thomas H. Newton, and Karen King Mitchell, JJ.

Darren Berry filed a class action on behalf of Volkswagen owners and lessors, alleging Volkswagen violated the MMPA by selling vehicles with defective window regulators. Five years later, the parties reached a settlement. Under the terms of the settlement, class members could apply for reimbursement for having repaired a defective regulator and receive a payment of \$75, or class members could seek to have the regulator repaired at a Volkswagen dealership and receive a payment of \$75. Volkswagen also agreed to pay reasonable attorney's fees to Class Counsel. Notice was disseminated to roughly 22,000 class members, and class members had ninety days in which to make their claim. When the claims period closed, only 177 claims had been made, with Volkswagen paying approximately \$125,000 to Missouri consumers.

The trial court held a hearing on Class Counsel's motion for attorney's fees, in which Class Counsel calculated a lodestar (hours times hourly rate) of approximately \$3,000,000 and requested their lodestar be multiplied. The trial court found the lodestar reasonable and used a multiplier of 2.0 to award roughly \$6,000,000 to Class Counsel for attorney's fees. Volkswagen appeals.

REVERSED AND REMANDED.

Division One holds:

We first address Class Counsel's motion to dismiss the appeal. Class Counsel contends the parties agreed not to appeal the attorney's fees awarded by the trial court. However, the Settlement Agreement does not have an explicit waiver of the right to appeal and the document as a whole contemplates an appeal, and specifically contemplates the appeal of attorney's fees. Therefore, the motion is denied.

Volkswagen raises five points. Because all of Volkswagen's points dispute the attorney's fee award, we address them together. Volkswagen's principal argument is that the attorney's fee award is unreasonable because it is so disproportionate to the actual funds recovered by the class.

Precedent holds that the starting point in determining reasonable attorney's fees is the lodestar. The trial court is considered an expert on the issue of attorney's fees and, here, did not abuse its discretion in finding the lodestar was reasonable.

However, the application of a multiplier was not justified. Enhancements beyond the lodestar are called for only in rare and exceptional circumstances, which were not present here.

First, an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation and many of the factors cited by the trial court to enhance the fee award are duplicative of the factors used to determine Class Counsel's lodestar. Second, the instant case does not reflect those "rare circumstances" in which an enhanced fee may be justified, such as an extraordinary outlay of expenses or unanticipated delay. Finally, the results obtained for the class do not justify an enhancement. While the trial court found the potential value of the suit was \$23 million, the class members recovered less than \$150,000, and the result did not rebut the presumption that the lodestar represented reasonable attorney's fees.

Class Counsel further moves for attorney's fees on appeal and damages for a frivolous appeal. We reject the argument that the appeal was frivolous, and in our discretion, award attorney's fees on appeal.

In conclusion, Class Counsel's motion to dismiss Volkswagen's appeal is denied; the trial court's judgment awarding attorney's fees is reversed; the attorney's fees award is reduced to the lodestar; and on remand, the trial court is ordered to enter judgment accordingly. Class Counsel's motion for reasonable attorney's fees on appeal is granted and remanded for determination.

Opinion by: Thomas H. Newton, Judge

June 12, 2012

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