

Summary of SC92770, Darren Berry v. Volkswagen Group of America, Inc.

Appeal from the Jackson County circuit court; Judge Michael W. Manners

Argued and submitted December 10, 2012; opinion issued April 9, 2013

Attorneys: Volkswagen was represented by John W. Cowden and David M. Eisenberg of Baker Sterchi Cowden & Rice LLC in Kansas City, (816) 471-2121 and Daniel V. Gsovski of Herzfeld & Ruben PC in New York, (212) 471-8512; the consumers were represented by Patrick J. Stueve, Todd E. Hilton, Jack D. McInnes and Bradlet T. Wilders of Stueve Siegel Hanson LLP in Kansas City, (816) 714-7100; The Missouri Association of Trial Attorneys was represented by Bradford B. Lear and Todd C. Werts of Lear & Werts LLP in Columbia, (573) 875-1991; and the Product Liability Advisory Council Inc. was represented by Hugh F. Young Jr. of the Product Liability Advisory Council Inc. in Reston, Virginia, (703) 264-5300, Mark A. Behrens of Shook, Hardy & Bacon LLP in Washington, DC, (202) 783-8400, and Robert T. Adams of Shook Hardy & Bacon LLP in Kansas City, (816) 474-6550.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Volkswagen challenges a judgment awarding attorneys' fees to the attorneys in the underlying class action lawsuit. Volkswagen also challenges the lodestar amount and the multiplier applied to the fees in its argument. In a 4-1 decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the circuit court's decision.

In an opinion dissenting in part, Judge Laura Denvir Stith agrees that the motion to dismiss the appeal filed by the class of Missouri plaintiffs ("Class") should be overruled. She also agrees that class counsel are partially successful on appeal and that it is appropriate for the trial court to determine on remand the appropriate amount of attorneys' fees incurred on appeal. She further agrees with the principal opinion that the lodestar amount approved by the trial court was reasonable. But, Judge Stith believes the trial court's findings do not indicate that in approving the lodestar amount – hours expended multiplied by hourly billing rates – it considered the factors this Court requires a trial court to consider in approving attorneys' fees. Its opinion states it instead considered those factors in determining to double the lodestar amount in granting class counsel's fee request. This was an abuse of discretion. Alternatively, if the trial court *sub silencio* did consider the necessary factors in approving the lodestar, then its use of many of them a second time in approving the multiplier also was an abuse of discretion. The same factors should not have been considered twice. The trial court also abused its discretion in expressly determining that it would not give any weight to the actual benefit to the class from the lawsuit.

Facts: Darren Berry filed suit against Volkswagen in 2005 alleging violations of the Missouri Merchandising Practices Act, section 407.010 RSMo, et seq., in that certain Volkswagen vehicles contained defective window regulators. Nationwide class certification was denied and the class was limited to plaintiffs in Missouri. Prior to trial, the parties settled in an agreement which divided the class into two groups, those who had repaired window regulators in their vehicles and those who had not repaired a window regulator. Volkswagen agreed to pay the costs of notifying the class, administering the settlement and reasonable attorneys' fees to class counsel. A three-day hearing was held for attorneys' fees at which class counsel submitted

calculations of 7,910 hours, a \$3,087,320 lodestar (hours reasonably expended multiplied by a reasonable hourly rate) and a multiplier of 2.6 to be applied to the award. Volkswagen argued against the multiplier. The trial court determined the hours, rate and lodestar were reasonable, and applied a multiplier of 2.0, along with all expenses and court costs. Volkswagen appeals the trial court's judgment. The class filed a motion to dismiss Volkswagen's appeal. Both matters are taken together.

AFFIRMED AND REMANDED.

Court en banc holds: (1) The motion to dismiss the appeal is overruled. Nowhere in the settlement is there language waiving the right to appeal the final determination of attorneys' fees.

(2) The trial court's judgment as to the multiplier applied to the lodestar amount is affirmed. The United States Supreme Court has set forth guidelines for federal cases stating when it is appropriate to apply a multiplier after awarding the lodestar amount in fee-shifting cases. It has also noted several specific circumstances when an enhanced award should be given; when the hourly rate does not adequately measure the attorney's true market value, when the attorney had an extraordinary outlay of expenses and litigation is exceptionally protracted and when attorney's performance involves exceptional delay in payment of fees. Given the factual findings made by the trial court and noting this was complex class action litigation, this Court cannot say the value of the lodestar was not arbitrary, unreasonable or an abuse of discretion. The trial court's findings support a finding that a multiplier was necessary to ensure a market fee that compensated class counsel for taking this case. While appellate courts have authority to allow and fix the amount of attorney's fees on appeal, we believe in most cases the trial court is better equipped to hear evidence and argument on this issue and determined the reasonableness of the fee requested. On remand the trial court shall make specific findings to determine the appropriate amount of attorneys' fees on appeal and to enter the judgment accordingly.

Dissenting opinion by Judge Stith: The lodestar amount is the product of the hourly rates charged by class counsel multiplied by the total number of hours expended on the case. In determining the lodestar amount the trial court must consider the reasonableness of the amount charged per hour and the reasonableness of the hours expended. Missouri law requires that, while a trial court has discretion in determining reasonable attorneys' fees, it must consider the result achieved in so doing. The trial court's findings of fact and conclusions of law do not indicate that it considered this or other necessary factors in determining the fees per hour to be reasonable. As it listed in detail the factors it considered in determining to double that lodestar amount by applying a "multiplier" of two in awarding fees, it appears it did not consider these factors in determining the lodestar itself. If so, that would be an abuse of discretion. Alternatively, if it did consider these factors in determining both the lodestar and the multiplier, then this also was an abuse of discretion. Each factor should be considered, but should not be given double weight. The principal opinion errs in recognizing this rule, but nonetheless approving the award. For this reason, while Judge Stith agrees that the lodestar amount is reasonable in light of the skill of counsel, the work required and the result achieved, she does not approve of the multiplier. It may be that a multiplier is appropriate, but this should be determined without considering the same factors twice.

Judge Stith also notes that the trial court expressly stated it would not consider the actual recovery by the class in determining the multiplier, and instead expressly considered only the potential benefits to the class from the settlement. This was error. Both factors are a part of the result obtained, and both should have been considered. The case should be remanded.