MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DARREN BERRY, ET AL.,	)	
	)	**WD73974**
Respondents,	)	
v.	)	**OPINION FILED:**
	)	
VOLKSWAGEN GROUP OF AMERICA, INC.,	)	**June 12, 2012**
	)	
Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Michael W. Manners, Judge

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

Volkswagen Group of America, Inc. (Volkswagen) appeals the trial court's judgment awarding attorney's fees to Class Counsel after a "claims-made" settlement of a class action brought under the Missouri Merchandising Practices Act (MMPA). We deny Class Counsel's motion to dismiss the appeal; reduce attorney's fees to the lodestar amount; grant Class Counsel's motion for attorney's fees on appeal; and remand to the trial court to determine reasonable attorney's fees for the appeal.

Factual and Procedural Background

In 2005, Mr. Darren Berry filed a class-action petition on behalf of owners and lessors of certain Volkswagen vehicles (the Class). Mr. Berry alleged that Volkswagen had sold the vehicles with defective window regulators, which violated the MMPA and breached express and

implied warranties under Michigan law. In 2007, the trial court certified a statewide class and denied the application for a nation-wide class under Michigan law. On May 17, 2010, the parties reached a settlement.

The Settlement Agreement provided for a division of the class into two groups who had experienced window regulator failures within ten years of the vehicle going into service. The first group, class members who had repaired the regulators, was to be reimbursed for the repair or replacement and compensated $75 for each incident. The second group, class members who had not repaired a failed window regulator, was to receive repair at an authorized Volkswagen dealer within ninety days "of the date on which Notice is mailed," and a payment of $75. Volkswagen was to pay the costs of notice and administering the settlement.

In June 2010, the trial court granted preliminary approval of the settlement and ordered notice disseminated to the class. A third-party company, Rust Consulting (Rust), was approved by the trial court to be the claims administrator. Rust published a class notice as an advertisement in four Missouri newspapers on July 17, 2010. The project administrator testified that they mailed notice to 22,304 class members, established a toll-free number, and set up a post office box and a website. Of the mailed notices, 6,150 were returned as undeliverable; 3,983 of these were resent to updated addresses. One hundred other notices were returned with forwarding addresses and Rust forwarded those that were returned by October 11, 2010.

Class members were required to submit the claim form within ninety days of mailing, postmarked by October 11, 2010. The claims form required the first group, class members who had repaired or replaced the failed part, to submit a receipt for purchase of the part, and/or to submit "one or more receipt(s) that describe(s) each documented incident or workshop visit," showing that "a Window Regulator failure was diagnosed, repaired, replaced or purchased and . .

. contain[ing] the date and location of the facility." The claims form defined "receipt" and provided for an alternative procedure of certification if a receipt was not available, which required the class member to provide "certification statement[s]" and "proof of payment of the repair and/or replacement." The second group, class members who had not repaired a regulator but had experienced a failure, was required to "set forth . . . a statement of the date, nature and circumstances of each such failure, the reasons why [the class member had not] had the failure repaired until now, and the names, addresses and telephone numbers of other persons who have knowledge of these facts and can verify them." The notice further provided that reimbursement would be conditioned on court approval.

When the claims period closed on October 11, 2010, only 177 claims had been made. One hundred and thirty of those were determined valid by the parties and Rust by December 19, 2010. The payout amount was $125,261 to Missouri consumers who experienced window regulator failures.

In September 2010, the trial court had granted Volkswagen's motion to defer ruling on Class Counsel's Fee Application until complete claim data was available. Over three days of hearing in December 2010 and January 2011, the trial court heard evidence on attorney's fees pursuant to subsection 407.025.2[1], which authorizes the trial court to award "reasonable attorney's fees" in class actions under the MMPA. At the hearing, Class Counsel argued it had expended 7,910 hours on the case and calculated a lodestar[2] of $3,087,320. An approximate breakdown of their lodestar for counsel time is: roughly fourteen percent of the time was billed at

[1] Unless otherwise indicated, statutory references are to RSMo 2000.

[2] "The lodestar is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate." *Trout v. State*, 269 S.W.3d 484, 487 (Mo. App. W.D. 2008) (internal quotation marks and citation omitted).

$650 per hour, forty-two percent between $400 and $500 per hour, fifteen percent at $375 an hour, and one percent at $252 an hour. Thus, over seventy percent of their lodestar was billed between $375 and $650 an hour. The remaining twenty-eight percent of the lodestar was for professional staff, billing roughly $200 per hour for twenty-three percent of the lodestar and approximately $140 per hour for five percent. Volkswagen told the trial court it was not arguing that Class Counsel "billed time that they shouldn't have billed" and was not "nit-picking with them about the number of hours they spent on certain matters or whether they should have spent a certain number of hours on the case." Nor did it dispute the "experience, talent, and lawyering that was done in the case by [Class] counsel." Class Counsel requested its loadstar be multiplied by 2.6, arguing that such a fee award represented approximately twenty-five percent of the "value of the settlement" based on its damages expert's calculation that 6.5 window regulators would fail over each vehicle's life. Class Counsel's expert testified that the regulators were "uniformly defective and not able to withstand normal operating conditions for which they were intended."

The trial court found that the time incurred by Class Counsel and its hourly rates were reasonable, that its lodestar was $3,087,320, and determined that it was appropriate to apply a multiplier of 2.0, thereby increasing the attorney's fees to $6,174, 640. It also awarded $550,000 in expenses and assessed court costs against Volkswagen.

Volkswagen appeals the attorney's fees award. Class Counsel moved to dismiss the appeal, contending that Volkswagen had waived its right to appeal the attorney's fees awarded by the trial court in the parties' Settlement Agreement. The motion to dismiss the appeal is taken with the case.

Standard of Review

The trial court's decision to award attorney's fees is reviewed for abuse of discretion. *Bachman v. A.G. Edwards, Inc*., 344 S.W.3d 260, 267 (Mo. App. E.D. 2011). An abuse of discretion occurs where "the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Id*. (internal quotation marks and citation omitted). Because the trial court is considered an expert on the issue of attorney's fees, we give deference to its decision. *Id*. "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Legal Analysis

Initially, we address Class Counsel's motion to dismiss Volkswagen's appeal. Class Counsel contends that in the Settlement Agreement, Volkswagen agreed to pay the reasonable fees awarded by the trial court, that the parties agreed that the settlement was a final resolution of all matters, and that Volkswagen agreed not to appeal the award of attorney's fees.

Class Counsel focuses on the agreement's provisions for the procedure to determine and pay attorney's fees, but nowhere within the Settlement Agreement is there the language of a waiver of a right to appeal. While it is true that in section 6.1, Volkswagen agreed "to pay [Class] Counsel's 'reasonable attorneys' fees and expenses in an amount approved by the Court," in order to determine the parties intent, "we review the terms of a contract as a whole, not in isolation." *U.S. Neurosurgical, Inc. v. Midwest Division-RMC, LLC*, 303 S.W.3d 660, 665 (Mo. App. W.D. 2010). A review of the Settlement Agreement shows that the document contemplates an appeal, and specifically contemplates the appeal of attorney's fees. Section 1.9 defines the term "final" in reference to the status of an appeal. Section 1.9 further separates the finality of

the judgment itself from the appeal of attorney's fees: "Any proceeding or any appeal or petition for a writ of certiorari pertaining solely to the award of the attorneys' fees or expenses provided for in this Agreement will not in any way delay or preclude the Judgment from becoming Final." Section 6.2 refers to the status of the "Attorney Fees" award after the trial court grants approval of the settlement and the fee application, requiring that it be deposited and that "[f]or such time as the Fee Award is subject to an actual or potential challenge at the appellate level," Class Counsel would "provide security for repayment." Further, section 6.4 states that the trial court's decisions on the fee application "are not part of the Settlement" and that "any appeal from any order relating [to the fee application] or reversal or modification thereof" would not terminate or cancel the settlement or "affect or delay the finality of the Judgment approving this Settlement." Consequently, from the plain language of the settlement agreement, we cannot conclude the parties waived rights to appeal attorney's fees. Class Counsel's motion to dismiss is denied.

Attorney's Fees

Volkswagen raises five points on appeal contesting the attorney's fee award. Volkswagen first contends that a reasonable attorney's fee award must bear a relationship to the amount of the recovery and that Class Counsel's award is forty-nine times the class recovery and therefore grossly disproportionate. In its second point, Volkswagen argues that the trial court erred in finding that the "potential" value of the recovery was $23 million. In its third point, Volkswagen contends the trial court erred in doubling Class Counsel's lodestar. In its fourth point, Volkswagen argues the trial court abused its discretion in that the award offends public policy and undermines the purposes of class actions. In its fifth and final point, Volkswagen argues the award violates due process. Because all of Volkswagen's points dispute the attorney's fee award, we address them together.

As noted, the Settlement Agreement provided for "reasonable attorneys' fees and expenses." The MMPA also provides that in a class action "brought pursuant to [the MMPA], the court may in its discretion order, in addition to damages, injunction or other equitable relief and reasonable attorney's fees." § 407.025.2. After finding the lodestar had a value of $3,087,320, the trial court determined doubling the lodestar was appropriate because of a number of factors, including the skill necessary to try the case; Class Counsel had outstanding experience, reputation, and ability; Class Counsel was precluded from taking other non-contingent cases by the instant case and Class Counsel's work on other cases was delayed; and that the requested multiplier was "not disproportionately excessive in light of the 'potential' benefit conferred on members of the class" of $23 million, "assuming a 100 [percent] claims rate." At the same time, however, the trial court recognized that "as is typical in such cases, only a tiny fraction of the class members will make a claim," and it expected the amount recovered by class members to be "unlikely to exceed $150,000."

A. Factors considered in the calculation of reasonable attorney's fees

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. In determining what is reasonable, "[t]he trial court is considered to be an expert on the question of attorney fees." *Alhalabi v. Mo. Dept. of Natural Res.*, 300 S.W.3d 518, 530 (Mo. App. E.D. 2009).

To determine a reasonable fee in contingency cases, courts generally use either the percentage of funds method, which awards counsel a percent of the common fund,[3] or the lodestar method, which multiplies hours times rate and may be adjusted upwards or downwards, and the decision on which methodology to use is most often left to the trial court's discretion.

[3] A "common fund" is a fund under the control of the court that is created, increased, or preserved by a litigant and in which non-litigants are entitled to share. *Lett v. City of St. Louis*, 24 S.W.3d 157, 163 (Mo. App. E.D. 2000).

See, e.g., *In re N.M. Indirect Purchasers Microsoft Corp*., 149 P.3d 976, 990 (N.M. Ct. App. 2006). Another practice is to use the "lodestar cross-check" method, which combines the two. Task Force on Contingent Fees, Tort Trial and Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litig.*, 25 REV. LITIG. 459, 470 (2006). In this combined method, "[t]he court chooses an appropriate percentage but then also calculates what the lodestar would be and what multiplier would be necessary to reach that percentage figure."[4] *Id*. In Missouri, we have stated that the "starting point in determining attorneys' fees" is the lodestar. *Alhalabi*, 300 S.W.3d at 530 n.6. The Supreme Court has stated that the lodestar method carries a strong presumption that it, alone, reflects reasonable attorney's fees. *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662, 1673 (2010).

B. The trial court did not abuse its discretion in finding the lodestar amount was reasonable

When determining "reasonable" attorney's fees, the trial court should consider factors such as "the time spent, nature and character of services rendered, nature and importance of the subject matter, degree of responsibility imposed on the attorney, value of property or money involved, degree of professional ability required, and the result." *Major Saver Holdings, Inc. v. Educ. Funding Group, LLC*, 350 S.W.3d 498, 509 n.7 (Mo. App. W.D. 2011) (citation and internal quotation marks omitted).

Here, the trial court made the following specific findings:

(a) The nature of the defect involved was a novel problem;
(b) The skill requisite to prepare and try this case—which the parties estimated would take three weeks—was necessarily high;
(c) Taking this case precluded class counsel from accepting other employment that would have been less risky;
(d) The experience, reputation, and ability of class counsel is outstanding;
(e) The fee to be received by counsel was always contingent . . .

[4] It appears that this is the method Class Counsel was seeking to employ in requesting both the lodestar and a multiplier and that it reached its claimed fee amount by using the "potential benefit" of $23 million conferred upon the class, rather than the "actual benefit" of $125,261 paid to class members making claims.

(f) The time required by the demands of preparing this cause for trial delayed work on class counsel's other work; and
(g) Class counsel adduced evidence that the fee this Court believes is appropriate in this case is not disproportionately excessive in light of the potential benefit conferred on members of the class.

These findings support the court's determination that the lodestar amount was reasonable.

C. The application of a multiplier was unjustified

At the trial court, Class Counsel argued that its total fee request (the lodestar increased by a multiplier) was reasonable because it resulted in a fee award approximating twenty-five percent of the "value of the settlement." While Volkswagen does not dispute the number of hours expended on the litigation or that such time was reasonable (and we have already determined that the value of the lodestar was reasonable), Volkswagen does dispute the application of a multiplier to the lodestar amount.

In *Perdue*, the Supreme Court determined that enhancements beyond the lodestar amount "may be awarded in 'rare' and 'exceptional' circumstances." *Perdue*, 130 S.Ct. at 1673 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)). The Court identified three such circumstances: (1) "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"; (2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted"; and (3) "where an attorney assumes [various] costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." *Id*. at 1674-75.

The Eastern District recently addressed the issue of a lodestar multiplier as one of first impression in Missouri in *Zweig v. Metropolitan St. Louis Sewer Dist*., 2012 WL 1033304, *7 (Mo. App. E.D. March 27 2012). The *Zweig* court adopted the majority's reasoning in *Perdue*.

Id. It determined in accord with *Perdue* that a lodestar was subject to a strong presumption that it represented reasonable attorney's fees and that the lodestar should only be enhanced in "rare circumstances." *Id*. We, in turn, adopt the reasoning of *Zweig* and *Perdue.* Applying these precedents, while we defer to the trial court's lodestar finding, we find that the trial court abused its discretion in applying a multiplier to determine reasonable attorney's fees, in that none of the trial court's findings support the application of the multiplier under the three factors recognized in *Zweig* and *Perdue*.

First, "[a]n enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Perdue*, 130 S.Ct. at 1667. As in *Zweig* and *Perdue*, many of the factors used by the trial court here to enhance the fee award are duplicative of the factors used to determine Class Counsel's lodestar. Counsel's hourly rate in the lodestar already reflects the "experience, reputation, and ability" used to prosecute the case. *See id*. at 1672 n.4. Likewise, the lodestar award of Class Counsel's hourly rate for time Counsel expended already reflects that counsel has chosen the instant case over pursuing other cases, contingent and non-contingent alike.

Second, the instant case does not reflect those "rare circumstances" in which an enhanced fee may be justified. There was no indication that the lodestar failed to sufficiently compensate Class Counsel for their true market value. *See Zweig*, 2012 WL 1033304 at *7. While Class Counsel did demonstrate an "extraordinary outlay of expenses," those expenses were awarded by the trial court and are not contested here by Volkswagen; thus, the outlay of expenses also does not justify a multiplier. *See id*. And although the litigation lasted approximately five years, there is no finding that this was either an exceptional or unanticipated delay. *See id*. at *8.

D. The result obtained in this case does not constitute a "rare" or "exceptional" circumstance justifying an upward departure from the lodestar.

Although the Court in *Perdue* identified only three "rare" and "exceptional" circumstances justifying lodestar enhancements, the Eastern District in *Zweig* noted that "this does not appear to be an exhaustive list but only guidance as to what constitutes rare circumstances." *Zweig*, 2012 WL 1033304 at *11 n.7. We agree. We have previously noted that in determining a reasonable attorney's fee, "'the most critical factor is the degree of success obtained.'" *Trout v. State*, 269 S.W.3d 484, 488 (Mo. App. W.D. 2008) (quoting *Hensley*, 461 U.S. at 436). And in Missouri we have found that in "cases involving complex litigation or in the class action context, a one-third contingent fee award is not unreasonable." *Bachman*, 344 S.W.3d at 267. Therefore, an enhancement of the lodestar to allow class counsel a fee award that represents a percentage of the settlement may be appropriate. The issue, then, is how we determine the value of a settlement.

In this case, Class Counsel sought an award approximating twenty-five percent of the "potential benefit" of the settlement, which it calculated at $23 million. And the trial court found that such an award was not disproportionately excessive in light of the potential benefit conferred on members of the class. Volkswagen argues that the use of the "potential benefit" in determining attorney's fees was improper in light of the fact that the "actual benefit" was less than $150,000. Thus, it argues, the result obtained does not constitute an exceptional circumstance justifying a multiplier.

We agree with Volkswagen that in this case the "potential benefit" to the class of $23 million is not the measure of the degree of success obtained. Nor is the recovery in a contingency case directly analogous to the "potential benefit" to the class in a claims-made settlement where the defendant has no obligation to create a common fund. As many courts have recognized, to value a "claims-made" settlement at a one-hundred-percent return rate is largely

illusory. *See, e.g., In re TJX Cos. Retail Sec. Breach Litigation*, 584 F. Supp. 2d 395, 401-02 (D. Mass. 2008) (finding where class only obtained roughly $6,100,000 of alleged $200,000,000 in settlement benefits, attorney's fees greater than the recovery no longer appeared reasonable, and citing circuit split on this issue of valuation). In reality, "only a fraction of any given class is likely to claim the benefits provided for in a settlement." *Id*. Indeed, "it is not unusual for only 10 or 15% of the class members to bother filing claims," and where class members are required to provide proof of their claim, "response rates are often very small." *Id*. at 404 (internal quotation marks and citation omitted); *see also Sylvester v. CIGNA Corp*., 369 F. Supp. 2d 34, 52 (D. Me. 2005) (noting that "claims made settlements regularly yield response rates of 10 percent or less" and finding the distribution of a common fund (including a 30% attorney fee award) facially unfair, unreasonable, and inadequate where it was premised on an assumed one-hundred-percent response rate)).

Our review shows that Federal and State courts across the country are divided on the issue of whether the results obtained by class counsel in a claims-made settlement should be viewed, as the trial court did, by the potential benefit to the class, or the actual results obtained for the class after the claims process. *See, e.g., Lonardo v. Travelers Indem. Co*., 706 F. Supp. 2d 766, 798-802 (N.D. Ohio 2010) (citing and extensively discussing courts adopting opposing approaches). In an oft-cited statement, Justice O'Connor noted the concern that "there must at least be some rational connection between the fee award and the amount of the *actual* distribution to the class." *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (denying certiorari) (emphasis added). Among the concerns with not measuring the "result" by the class's actual recovery are decoupling "class counsel's financial incentives from those of the class," and

undermining "the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class." *Id*.

Viewing the success of the suit by the potential recovery in such a claims-made settlement and assuming, as was done here, a one-hundred-percent rate of return is inappropriate. As noted, trial court itself acknowledged the prediction that "only a tiny fraction of the class members will make a claim," and it expected the amount recovered by class members to be "unlikely to exceed $150, 000," yet it tied the attorney's fee award to the "potential benefit" of $23 million. Generally, the class's actual recovery should bear some relation to the fee award.[5] Otherwise, the award effectively rewards class counsel in a manner almost arbitrary to the relief afforded to the class and provides little incentive for counsel to ensure the class obtains full relief. Tying the consideration of class counsel's success to the actual recovery benefits the class action by "encourag[ing] more realistic settlement negotiations and agreements," and giving class counsel "an incentive to . . . devise better notice programs, settlement terms, and claim procedures, all to the benefit of the consumers who have been harmed" and in whose names the suit was brought. *In re TJX Cos.*, 584 F. Supp. 2d at 406.

Yet valuing the class benefit by *only* what the defendant actually pays out in a claims-made settlement also presents concerns. A reasonable fee should be "sufficient to induce a capable attorney to undertake the representation of a meritorious" consumer protection case under the MMPA. *See Perdue*, 130 S.Ct. at 1672 (defining a "reasonable" fee award under 42

[5] In fact, as noted by commentators, Congress addressed this specific concern in the Class Action Fairness Act by requiring that in the case of coupon awards, "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." *See* Task Force on Contingent Fees, Tort Trial and Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litig.*, 25 Rev. Litig. 459, 473 (2006) (quoting 28 U.S.C. § 1712(a) (2005));. Similarly, in the Private Securities Litigation Reform Act, Congress provided that fees to class counsel, "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." Task Force on Contingent Fees, *Report on Contingent Fees in Class Action Litig.*, 25 REV LITIG. 459, 473 (quoting 15 U.S.C. § 78u-4(a)(6)).

U.S.C. § 1988). Valuing the suit by the claims-made result may not be sufficient to address the underlying concern of incentivizing attorneys to take on a meritorious class action. Further, as argued by Class Counsel, "[f]ees are incurred regardless of the result they achieve." *Rhodus v. McKinley*, 16 S.W.3d 615, 620 (Mo. App. W.D. 2000). If only the actual recovery were used, the attorney's performance expended in obtaining the settlement might not be reflected in the fee award. Vigorous hours spent in litigation protracted by defense counsel might go uncompensated. Additionally, class counsel creates the opportunity for recovery, which is a benefit conferred even if a class member does not take advantage of it. Finally, the benefit conferred by a successful MMPA class action is not solely the amount of recovery, but also the vindication by private litigants of a public wrong. *See Plubell v. Merck & Co., Inc*., 289 S.W.3d 707, 711 (Mo. App. W.D. 2009) ("The purpose of Missouri's Merchandising Practices Act is to preserve fundamental honesty, fair play and right dealings in public transactions.").[6]

Here, where the "potential" value of the suit was $23 million, but the class members recovered less than $150,000, the "result" did not rebut the presumption that the lodestar represented reasonable attorney's fees. As noted by the U.S. Supreme Court, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley*, 461 U.S. at 435. While we do not ignore the "potential benefit," given the small actual recovery by the class, this is not a case of exceptional success for the class justifying an enhancement, nor do the other factors found by the trial court justify the enhancement.

[6] In an interesting approach, after agreeing that counsel added value in "leading a horse to water," one court adopted counsel's proposed compromise for a percentage of fund cross-check to a lodestar and measured the value of the recovery as the midway point between the "potential" recovery and the actual recovery. *Lonardo v. Travelers Indem. Co*., 706 F. Supp. 2d 766, 800, 802 (2010).

In the present case, we believe awarding Class Counsel's lodestar was appropriate and sufficient to address these competing concerns and was thus not against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice. We do not believe, however, that the "result" justified a multiplier. Consequently, we reject the trial court's multiplier and reduce the attorney's fee award to the lodestar.

Attorney Fees on Appeal

Class Counsel further moves for attorney's fees on appeal and damages for a frivolous appeal. Missouri follows the American Rule, which generally requires litigants to pay their own attorney fees "absent statutory authorization or contractual agreement." *Rosehill Gardens, Inc. v. Luttrell*, 67 S.W.3d 641, 648 (Mo. App. W.D. 2002). Class Counsel requests attorney's fees based on their contentions that (1) the appeal is frivolous because it was precluded by the Settlement Agreement, (2) the Settlement Agreement provided that Volkswagen would pay reasonable attorney fees and expenses, or (3) under our authority under the MMPA.

As we have discussed, the Settlement Agreement did not preclude the appeal of attorney's fees and we consequently reject Class Counsel's argument that Volkswagen's appeal was frivolous. We similarly reject Class Counsel's second argument because the Settlement Agreement does not show that Volkswagen agreed to pay attorney's fees on appeal. Rather, section 6.1 shows Volkswagen's agreement to reasonable attorney's fees and expenses which Class Counsel would apply for "at the time the parties file their Motion for Preliminary Approval of the Settlement."

Subsection 407.025.2 of the MMPA states that the court "may in its discretion order . . . reasonable attorney's fees" in any "action brought pursuant to this section." We have previously found it to be "inconsistent with the intent of the legislature" to refuse compensation to "an

attorney for the time reasonably spent on appellate work defending the judgment below" where the statute at issue provides for attorney's fees. *Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208, 214 (Mo. App. W.D. 2007). Volkswagen correctly argues that in the instant case Class Counsel was defending attorney's fees, not the underlying judgment. Additionally, subsection 407.025.2 differs from cases discussing this reasoning in that the subsection provides for a discretionary award. However, we find it to be consistent with legislative intent in the MMPA to compensate Class Counsel for time spent defending the attorney's fees award and exercise our discretion to award attorney's fees on appeal. Class Counsel contends they expended 697.9 hours on post-judgment actions and the appeal and request $290,966 for attorney's fees and expenses. Because the trial court is "better equipped to hear evidence and argument" on attorney's fees and expenses, including "the value of appellate services," we remand to the trial court solely to determine reasonable attorney's fees on appeal. *See Rosehill Gardens, Inc.*, 67 S.W.3d at 648.

Conclusion

For the foregoing reasons, 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 $3,087,320, 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 we remand to the trial court to determine reasonable attorney's fees for the appeal.

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Thomas H. Newton, Judge

Martin, P.J., and Mitchell, J. concur.