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March 1, 2023

Via TrueFiling

Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Niedermeier v. FCA US LLC* Case No. S266034


Honorable Justices:

We represent Petitioner Lisa Niedermeier. This letter is to inform the Court that on February 27, 2023, after we filed Ms. Niedermeier's February 22, 2023 Supplemental Brief on New Authority, the Third District Court of Appeal issued an order modifying the *Williams* opinion. For the Court's reference, we attach that order to this letter.

The citations to *Williams v. FCA US LLC* (Cal. Ct. App., Feb. 1, 2023, No. C091902) 2023 WL 1430403 in the previously filed brief remain unchanged.

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman

By: _____


Cynthia E. Tobisman
Petitioner LISA NIEDERMEIER

CET:cth
cc: Proof of Service

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Butte)

MELISSA A. WILLIAMS et al.,

Plaintiffs and Appellants,

v.

FCA US LLC,

Defendant and Respondent.

C091902

(Super. Ct. No. 17CV02617

ORDER MODIFYING
OPINION AND DENYING
REHEARING

[NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of Butte County, Tamara L. Mosbarger, Judge. Reversed.

Greines, Martin, Stein & Richland, Cynthia E. Tobisman, Jeffrey Gurrola; Knight Law Group, Steve Mikhov, Roger Kirnos, Deepak Devabose; Wirtz Law, Richard M. Wirtz, Amy R. Rotman and Jessica R. Underwood for Plaintiffs and Appellants.

Horvitz & Levy, Lisa Perrochet, Shane H. McKenzie, John A. Taylor, Jr.; Nixon Peabody, Jennifer A. Kuenster, Leon V. Roubinian and Kristi J. Livedalen for Defendant and Respondent.

THE COURT:

It is ordered that in response to the petition for rehearing filed by defendant FCA US LLC, the opinion filed in this case on February 1, 2023, be modified as follows:

1. On page 17, the last full paragraph, beginning “Manufacturer also argues the Act,” and the paragraph commencing at the bottom of page 17, beginning “We fail to see” are deleted and the following paragraphs inserted in their place:

Manufacturer also argues the Act makes clear the buyer is expected to return the vehicle to the manufacturer, relying on section 1793.23, subdivisions (c) through (e) and our Supreme Court’s statement in *Kirzhner* that “ ‘buyers and lessees are legally required to pay . . . registration renewal fees incurred prior to the vehicle’s transfer back to the manufacturer.’ ” (Citing *Kirzhner, supra*, 9 Cal.5th at p. 980.) Manufacturer asserts it is clear a buyer must return the vehicle to the manufacturer because section 1793.23 “states in four different places that a defective vehicle is ‘accepted for restitution’ by the manufacturer.” We find these arguments inapplicable in determining the meaning of the phrase “the actual price paid or payable by the buyer,” as provided in the restitution provision.

Initially, manufacturer’s reliance on *Kirzhner* is misplaced. Our Supreme Court in that case did not consider whether a buyer must return a vehicle to pursue restitution. Cases are not authority for propositions not considered. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) For this same reason, we find no merit in manufacturer’s reliance on the first introductory sentence in *Gavaldon*, as relied upon in manufacturer’s petition for rehearing, which states, “[W]hen a manufacturer does not repair a motor vehicle to conform to an express warranty after ‘a reasonable number of attempts,’ the buyer may opt to have the item replaced, or may return the item and obtain restitution for its cost” (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1250.) *Gavaldon* did not consider whether a buyer *must* return a vehicle in order to pursue an action for restitution. (*Ibid.* [considering “whether a service contract is an express warranty within the meaning of the Act”].)

Section 1793.23 also does not assist manufacturer. Section 1793.23, subdivisions (c) through (e) pertain to situations in which the manufacturer or dealer “reacquires” the defective vehicle. These provisions are inapplicable in the situation where, as here, the manufacturer elects not to reacquire the vehicle and the buyer is forced to seek legal intervention. Nothing in those provisions state the buyer is entitled to restitution *only if* the manufacturer reacquires the defective

vehicle. Indeed, as manufacturer acknowledges, *Martinez* held the exact opposite. (*Martinez, supra*, 193 Cal.App.4th at pp. 194, 196 [a buyer need not own or possess the defective vehicle to pursue remedies under the Act].)

In a footnote, manufacturer states: “For purposes of this case, [it] does not challenge the holding in *Martinez* because that is not necessary to obtain affirmance of the judgment. But if, contrary to *Martinez*, the Act were read according to the plain language that contemplates return of the vehicle as part of the restitution process, the question presented in this case would be moot: owners could not pocket both the resale value and the statutory damages award as restitution (as they attempt to do here) because their failure to return the vehicle would preclude such an award.” Manufacturer has provided us with no basis or argument to depart from the holding in *Martinez*. We do not consider manufacturer’s new arguments raised in its petition for rehearing in that regard. We further find no merit in manufacturer’s attempt to distinguish *Martinez* on the basis that, here, “[t]here is no evidence that” buyers had “no choice but to dispose of the vehicle . . . while a manufacturer dragged its feet in complying with the Act.” The *Martinez* court’s holding was not fact specific; it was instead based on statutory interpretation. (*Martinez, supra*, 193 Cal.App.4th at pp. 193-196.)

Dovetailing the forgoing argument, manufacturer further argues that disallowing the trade-in credit would frustrate the Act’s “extensive provisions aimed at protecting consumers who might later acquire defective vehicles as used cars,” as discussed in *Niedermeier, supra*, 56 Cal.App.5th at page 1061 (rev. granted). We disagree. It makes no sense that the labeling and notification requirements in the Act would be promoted if we read the *restitution provision* to reduce a buyer’s recovery by the amount of the trade-in value of the defective vehicle. The defective vehicle has already been sold; the manufacturer simply gets the benefit of reducing its restitution obligation while obviating the responsibility it would otherwise have if it had reacquired the defective vehicle. As aptly explained in *Figueroa*, such a result does not further the pro-consumer and remedial intent behind the Act.

2. On page 20, the last two sentences of the first paragraph, beginning with “It is further significant that a buyer” and “Thus, a buyer may sell” are deleted.
3. At the beginning of the last paragraph on page 20, after the first sentence ending “seeks restitution under the Act,” add as footnote 9 the following footnote:

⁹ Manufacturer invites this court to address an issue first raised in its petition for rehearing, i.e., whether damages provisions in the Commercial Code, rather than the Act's restitution provision, apply when a buyer cannot or does not return the vehicle to the manufacturer. We decline the invitation. Our review in this appeal is limited to whether the jury erred in deducting the trade-in credit when it calculated "the actual price paid or payable to the buyer," as provided in the restitution provision.

4. On page 20, the fourth sentence of the first paragraph, beginning "It is significant the Legislature" is deleted and the following sentence is inserted in its place:

It is significant the Legislature vested *the buyer* with the right and power to elect restitution in lieu of replacement. (§ 1793.2, subd. (d)(2).)

5. On page 20, in the first sentence of the first full paragraph, beginning "Under manufacturer's and the *Niedermeier* court's interpretation," the word "elects" is changed to "accepts" and "instead of restitution" is removed so the sentence reads:

Under manufacturer's and the *Niedermeier* court's interpretation, if a buyer accepts a replacement vehicle, the buyer need not pay to the manufacturer the value he, she, or they received for the defective vehicle.

There is no change in the judgment.

Defendant's petition for rehearing and its request for judicial notice are denied.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Robie", written above a horizontal line.

Robie, Acting P. J.

A handwritten signature in cursive script, appearing to read "Hull", written above a horizontal line.

Hull, J

A handwritten signature in cursive script, appearing to read "Duarte", written above a horizontal line.

Duarte, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Williams et al. v. FCA US LLC, et al.
C091902
Butte County
No. 17CV02617

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

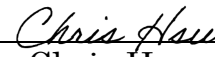
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 1, 2023, at Los Angeles, California.


Chris Hsu

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S266034**

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3/1/2023

Date

/s/Chris Hsu

Signature

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