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NO. 88385-8

SUPREME COURT
STATE OF WASHINGTON

WEST ONE AUTOMOTIVE GROUP, INC. d/b/a HERTZ CAR SALES,

Respondent/Cross Appellant
v.

SAMUEL C. ALVAREZ AND ROBERTA A. ALVAREZ, husband and wife and the marital community comprised thereof,

Appellants/Cross Respondents.

BRIEF OF RESPONDENT/CROSS APPELLANT

DAVIES PEARSON, P.C.
Christopher J. Marston, WSBA #30571
Ingrid McLeod, WSBA #44375
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. ASSIGNMENT OF ERROR

A. The trial court erred in entering judgment in favor of Samuel and Roberta Alvarez on West One Automotive Group, Inc.'s breach of warranty claim based on its conclusion that West One failed to mitigate its damages. CP at 842-44, 1047-55.

II. ISSUES PRESENTED FOR REVIEW

A. Is the trial court's denial of Samuel and Roberta Alvarez's motions for summary judgment properly before this court when they did not appeal the orders denying summary judgment, which the trial court entered based on its determination that material facts were in dispute?

B. Did the trial court err in denying Samuel and Roberta Alvarez's motions for summary judgment and judgment notwithstanding the verdict?

C. Must this Court resolve a split between the Divisions of the Court of Appeals regarding the prevailing party analysis under RCW 4.84.330 by holding that Division Three's prevailing party analysis in *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997) does not apply in consumer protection actions?

D. Despite the jury's verdict that Samuel and Roberta Alvarez breached their express warranty, did the trial court err in entering judgment on that claim based on its unsupported conclusion that West One Automotive Group, Inc. failed to mitigate its damages?

III. INTRODUCTION

This case began as a simple breach of contract suit between West One Automotive Group, Inc. ("West One") and Samuel and Roberta Alvarez, who breached an express warranty that they made to West One in trading-in their vehicle. Mr. and Mrs. Alvarez warranted that the title to their

trade-in vehicle was free from brands.[1] However, after accepting the trade-in from Mr. and Mrs. Alvarez based on the warranty and after paying off the $9,380 balance owing on the Alvarezes' purchase money loan, West One learned that title to the trade-in vehicle actually was branded.

A branded title decreases the value of a motor vehicle by approximately 20-to-50 percent. Accordingly, after West One's attempts to negotiate a rescission of the trade-in transaction with the Alvarezes failed, it was compelled to file suit, seeking rescission and to recover its damages.

In the course of litigation, Mr. and Mrs. Alvarez fought to amend their answer to include a cross claim alleging a consumer protection violation. Nevertheless, the jury considered all of the evidence and three-days worth of testimony and concluded that West One did not commit a consumer protection violation. While Mr. and Mrs. Alvarez repeat many of their arguments from below, attorney fees are at the center of this appeal.

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[1] When a motor vehicle is rebuilt after having been declared a total loss following a collision, title to that vehicle is "branded." CP at 837. A branded title is noted on the vehicle's title and registration and, sometimes, with a Washington State Patrol sticker affixed to the driver's side door panel.

IV. STATEMENT OF FACTS

West One is an Oregon corporation that operated a motor vehicle dealership in Yakima, Washington. CP at 3-4. In May 2008, Yakima realtor Samuel Alvarez and his wife Roberta Alvarez purchased a 2006 Cadillac SRX from West One's Yakima dealership. CP at 4, 835. As part of the transaction, Mr. and Mrs. Alvarez traded-in a 2003 Chevy Avalanche pickup truck they owned. CP at 4, 835.

Mr. Alvarez negotiated with West One for several days over the transaction. *See* CP at 835-36. As part of these negotiations, West One's sales person, Joseph Harris, spent approximately 30-minutes inspecting the Alvarezes' Avalanche and made copies of the registration documents in its glove compartment. CP at 835. The Avalanche was also at West One's dealership during Mr. Alvarez's multiple-hour test drive of the Cadillac. CP at 835.

Even though Mr. Alvarez had purchased the Avalanche 18-months earlier for $18,000 and had driven it 40,000 to 50,000 miles since he purchased it, Mr. Alvarez had hoped to receive a credit for his Avalanche of $17,500 towards the Cadillac purchase. CP at 835-36; 3 RP at 291, 331. Based on Mr. Alvarez's request, Mr. Harris informed him that he was struggling "getting the numbers to work." Clerk's Papers (CP) at

835-36; 3 RP at 291, 331. Ultimately, Mr. Alvarez signed contracts showing that West One provided $14,000 for the Avalanche, with $9,380 going to pay off the Alvarezes' purchase money loan with Catholic Credit Union and the remaining $4,620 credited towards their purchase of the Cadillac. CP at 37, 836. While Mr. and Mrs. Alvarez purchased the Cadillac from West One for $26,488, West One's gross profit was only $719.26. CP at 37, 836. Of that gross profit, West One paid Mr. Harris $500 and its finance manager $82.89. CP at 836.

Mr. and Mrs. Alvarez's transaction with West One was comprised of multiple documents. *See* CP at 37-39. Among the documents that Mr. and Mrs. Alvarez signed at West One was one titled "Sellers Disclosure Statement for Trade-In Vehicle." CP at 7, 836.

In the Sellers Disclosure Statement, Mr. and Mrs. Alvarez "certify, warrant, and declare under the penalty of perjury" that several statements regarding the Avalanche were true and correct, including:

> 1. That the vehicle has not been involved in any collision resulting in ANY FRAME, CHASSIS, OR UNIBODY DAMAGE and does not contain any hidden defects of the frame, chassis, or unibody; [and]
> . . . .
> 4. That the certificate of title for trade vehicle, regardless of the state titled in, does not indicate that the vehicle is "REBUILT, SALVAGE, LEMON, OR INSURANCE TOTAL LOSS" . . . .

(emphasis in original). CP at 7. The Sellers Disclosure Statement further states that:

> Seller [Mr. and Mrs. Alvarez] acknowledge[] that Buyer [West One] is relying on the foregoing warranties and without such warranties, [West One] would not be purchasing the vehicle. [Mr. and Mrs. Alvarez] further acknowledge[] that a breach of any of the foregoing warranties entitles [West One] to rescind this agreement and to recover from [Mr. and Mrs. Alvarez] any damages sustained by [West One] resulting from said breach including attorney[] fees and costs.

CP at 7 (emphasis omitted). As stated in the Sellers Disclosure Statement, West One did rely on Mr. and Mrs. Alvarez's warranty in agreeing to purchase their Avalanche as a trade-in. CP at 31, 193-95.

A few days after finalizing the transaction with Mr. and Mrs. Alvarez, West One promptly paid off the Alvarezes' loan on the Avalanche by sending a check for $9,380 to Catholic Credit Union. CP at 837. Shortly thereafter, West One learned that, contrary to Mr. and Mrs. Alvarez's warranty, the Avalanche had a branded title when they traded it in to West One. CP at 31. Indeed, the title showed two brands dated August 3, 2004, one from Oregon stating "Salvaged—Damaged" and one from Washington stating "Not Actual."[2] CP at 5. A branded title reduces the value of a vehicle by 20-to-50 percent. 3 RP at 177. For example, West One had allowed a $14,000 trade in value for the Avalanche because its retail value would have been approximately $19,325 *if* it was free from

[2] A brand of "Not Actual" indicates that the mileage shown on the odometer likely does not reflect the vehicle's actual mileage. 2 RP at 165.

brands on its title. 3 RP at 179-81. Instead, with a branded title it would need to be sold at auction and its median value at auction was only $3,800. 3 RP at 179-81.

West One has a policy of not retailing vehicles with branded titles. CP at 32. Thus, on June 2, 2008, the day that West One discovered that title to the Avalanche was branded, it contacted Mr. Alvarez to notify him about the branded title and to begin negotiations to rescind the trade-in transaction. CP at 31-32, 514-15. West One offered to release all legal interest in the Avalanche to Mr. and Mrs. Alvarez in exchange for payment of the $14,000 trade in allowance that West One had made for the Avalanche. CP at 84-85. Mr. Alvarez declined West One's offer, stating that he could not afford to repay West One for the trade-in credit on the Avalanche and also make payments on the Cadillac. CP at 515.

Instead, the Alvarezes eventually offered to rescind the entire transaction, returning the Cadillac to West One and retaking the Avalanche in exchange for reimbursing West One for the $9,380 it had paid to Catholic Credit Union to satisfy the Alvarezes' purchase money loan. *See* CP at 514-15; 3 RP at 297-99; 5 RP at 611-12. This offer failed to compensate West One for Mr. and Mrs. Alvarez's breached warranty and failed to address West One's anticipated lost profits on the sale of the

Avalanche or their use of the Cadillac. Thus, the Alvarezes were not offering a true recission.

Thus, despite several attempts, negotiations to unwind the Avalanche trade-in transaction proved unsuccessful. CP at 31-32. Accordingly, West One was compelled to file suit against Mr. and Mrs. Alvarez for recission and damages occasioned by their breach of warranty in the Sellers Disclosure Statement. CP at 3-7, 32.

Eventually, Mr. and Mrs. Alvarez filed an amended answer alleging a consumer protection counter claim under RCW 46.70.180(4)(b) and the Consumer Protection Act, codified at chapter 19.86 RCW (CPA). CP at 236-44. Thereafter, the court considered Mr. and Mrs. Alvarez's motions for summary judgment on both West One's breach of contract claim and their consumer protection claim. *See* CP at 44-147, 230-33, 244-73. However, the court denied Mr. and Mrs. Alvarez's motions because it concluded that material facts were in dispute and the matter proceeded to trial. CP at 302-04.

Because Mr. and Mrs. Alvarez had raised failure to mitigate damages as an affirmative defense and the evidence on that affirmative defense would necessarily include pre-trial settlement communications that could be confusing to the jury, the parties agreed to bifurcate the trial. CP at 512. Accordingly, the parties agreed that the jury would decide (1) if Mr.

and Mrs. Alvarez breached their warranty and, if so, (2) if West One suffered damages as a result, and (3) if West One violated the Consumer Protection Act by committing a violation of RCW 46.70.180(4). CP at 512. But, if the jury decided that Mr. and Mrs. Alvarez breached their warranty causing West One damages, then the trial court would decide if West One reasonably mitigated its damages. CP at 512.

Trial began more than four years after the transaction between West One and Mr. and Mrs. Alvarez. Given this significant amount of time, West One noted to the court that it was no longer interested in rescinding the transaction as a whole because it was impracticable to do so. 1 RP at 21-11. West One did, however, still have the Avalanche in storage and available to return to Mr. and Mrs. Alvarez. 5 RP at 621-22.

Unlike West One, Mr. and Mrs. Alvarez did not openly disclose to the court that they were no longer interested in rescinding the transaction as a whole. *See* 1 RP at 21-22. Instead, during the trial, Mr. Alvarez casually testified that he no longer had the Cadillac in his possession because he had traded it in for another vehicle before trial. 3 RP at 347.

Mr. Alvarez also testified that, even though he worked as a realtor and was well-versed with contracts, he failed to read the Sellers Disclosure Statement before signing it. 3 RP at 335-38. While he testified that he did not read the Sellers Disclosure Statement before signing it, Mr. Alvarez

did testify that he noted that the form was blank when he signed it. 3 RP at 255. In support of his claim that he signed a blank Sellers Disclosure form without reading it, Mr. Alvarez testified that he was frustrated and signed because he wanted to speed up the finalization of transaction. 3 RP at 338.

Mr. Alvarez further testified that, before he purchased the Avalanche, he took it to a mechanic for inspection. 3 RP at 335. During the course of that inspection, the mechanic informed him that the Avalanche had been in an accident and pointed out a sticker on the driver's door panel regarding the repairs. 3 RP at 335-37. Nonetheless, Mr. Alvarez testified that he never actually read the sticker that the mechanics pointed out to him before he purchased the Avalanche and that he was not worried about the prior accident. 3 RP at 335-37.

Despite testifying that he did not know that title to the Avalanche was branded, Mr. Alvarez had signed the title and—right beside the signature line—the title listed both the Oregon and Washington brands. *See* 3 RP at 337. Similarly, when Mr. Alvarez and his attorney met with West One staff to inspect the Avalanche, Mr. Alvarez immediately pointed out the WSP sticker on the driver's door panel. 2 RP at 137-38.

West One's CFO and VP for finance, Kathleen Wigmosta, testified that West One had a policy against retailing vehicles with branded titles. 3

RP at 146-47. Accordingly, as soon as she learned the Avalanche had a branded title on June 2, 2008, Ms. Wigmosta instructed the Yakima dealership to remove it from the sales lot. 3 RP at 133-34. Before receiving that instruction, however, the Yakima dealership had put the Avalanche on its sales lot with a window sticker advertising it for sale for $18,988, which is what its "Blue Book" value would have been, had the title been free from brands. 2 RP at 166.

Ms. Wigmosta also testified that it was standard practice to pay off a loan on a trade-in vehicle before receiving the title from the lender because state regulations require a dealership pay off any outstanding loan on a trade-in vehicle within three days. 2 RP at 140-41. In accordance with this standard practice, West One paid Catholic Credit Union $9,380 to satisfy the amount outstanding on Mr. and Mrs. Alvarez's loan for the Avalanche before receiving the title. 2 RP at 140-41.

Additionally, James Prunier from West One's finance department testified that he worked with Mr. and Mrs. Alvarez on their paperwork and that he had no knowledge that the Avalanche had a branded title until after the fact. 3 RP at 94. Additionally, Mr. Prunier testified that West One's general practice was to terminate negotiations if a customer declined to sign a Sellers Disclosure form as part of a trade-in deal. 3 RP at 92-94.

West One relied on the Sellers Disclosure Statement in accepting trade-in vehicles. CP at 31.

After considering all evidence presented and the credibility of the witnesses, the jury found that the Alvarezes did breach their express warranty, causing West One $3,800 in damages. CP at 505. The jury also found that West One had not violated the CPA. CP at 506.

Following the jury's verdict, Mr. and Mrs. Alvarez moved the court for judgment notwithstanding the verdict under CR 50. CP at 740-75. In their CR 50 motion, Mr. and Mrs. Alvarez argued extensively that the jury's verdicts on West One's breach of warranty claim and on their CPA claim were not supported by the evidence.[3] CP at 740-75. The court disagreed and denied the Alvarezes' motion. CP at 829-32.

Then, even though the court agreed that West One had suffered damage as a result of Mr. and Mrs. Alvarez's breach of warranty, the trial court concluded that West One had failed to mitigate its damages. CP 826-28. Based on that conclusion, the trial court denied West One any recovery from the Alvarezes on their breach of express warranty claim. CP at 833-44, 918-23.

[3] West One notes that the Alvarez CR 50 motion includes inflammatory and unsupported allegations of misconduct by West One's counsel and extensive argument regarding an unrelated case between counsel in which the court entered an injunction against West One. *See* CP at 740-75. The trial court properly ignored these improper and unsupported arguments.

Accordingly, in the trial court's final December 28, 2012, judgment, it decreed that judgment was entered in favor of West One on the Alvarezes' CPA claim and that judgment was entered in favor of the Alvarezes on West One's claim for *damages* as a result of the Alvarezes' breach of express warranty. CP at 918-23. In making this disposition, the court prepared a detailed written analysis in which it concluded that there was no prevailing party for purposes of RCW 4.84.330 because "each party brought a [single] claim against the other and the net award was $0." CP at 921-23.

Mr. and Mrs. Alvarez reiterated their arguments by bringing a motion for reconsideration, which the trial court denied. CP at 845-98, 917. Mr. and Mrs. Alvarez appealed the trial court's: (1) December 28, 2012 Judgment; (2) December 24, 2012 denial of their motion for reconsideration; (3) November 30, 2012 denial of their CR 50 motion for judgment notwithstanding the verdict; (4) November 30, 2012 Judgment on the verdict and Findings of Fact and Conclusions of Law; and (5) October 8, 2012 oral evidentiary ruling denying admission of pre-trial settlement communications in the jury portion of the trial. CP at 924-29. Shortly thereafter, West One appealed the trial court's judgment based on its conclusion that it failed to mitigate its damages. CP at 1047-48.

V. ARGUMENT

Mr. and Mrs. Alvarez argue that: (1) the trial court erred in denying their summary judgment motions, (2) the trial court erred by denying their motion for judgment notwithstanding the verdict, (3) they are entitled to an award of their reasonable attorney fees and costs as the "prevailing party" under the proper analysis of RCW 4.84.330. This court should disagree with each of Mr. and Mrs. Alvarez's arguments. Instead, this court should hold that the trial court erred in entering judgment on West One's breach of contract claim based on its conclusion that West One failed to mitigate its damages. In all other respects, however, this court should affirm.

A. *The trial court's denial of Mr. and Mrs. Alvarez's summary judgment motion is not properly before this court.*

As a preliminary matter, West One notes that Mr. and Mrs. Alvarez argue extensively in their opening brief that the trial court erred when it denied their motions for summary judgment. Br. of Appellant at 1, 6, 26-44. However, Mr. and Mrs. Alvarez failed to identify the trial court's orders denying summary judgment in their notice of appeal. CP at 924-58. Because Mr. and Mrs. Alvarez failed to identify the court's orders on summary judgment in their notice of appeal and because those orders do not prejudicially affect any of the orders that are identified in the notice of

appeal, review of the summary judgment denial is not proper under RAP 2.4(b).

Moreover, after a trial, an appellate court will not review a trial court's ruling denying summary judgment when the trial court determines that material facts were disputed and had to be resolved by the fact finder. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003); *see also* RAP 2.2.

Here, the trial court denied Mr. and Mrs. Alvarez's motions for summary judgment based on its determination that there were material facts in dispute over whether West One and the Alvarezes had a valid contract and the court also noted material questions of fact regarding the Alvarezes' consumer protection claim. *See* CP at 302-09, 230-31; 3 RP at 231, 388-403. Accordingly, even assuming Mr. and Mrs. Alvarez had properly initiated review of the court's orders denying their summary judgment motions, those orders are not subject to review after trial because the jury was called upon to resolve material factual disputes. Thus, this court should disregard Mr. and Mrs. Alvarez's arguments on any alleged error regarding the court's orders on summary judgment.[4]

[4] West One notes that, intertwined with Mr. and Mrs. Alvarez's arguments regarding summary judgment denial, they hint that they may also be arguing that substantial evidence does not support the jury's verdict that they breached their express warranty. Br. of Appellant at 4-5, 28-44. Because West One's response to Mr. and Mrs. Alvarez's appeal of the trial court's denial of their motion for judgment notwithstanding the verdict

B. *The trial court properly denied Mr. and Mrs. Alvarez's motion for judgment notwithstanding the verdict.*

In reviewing a trial court's ruling on a motion for judgment as a matter of law under CR 50, appellate courts engage in the same inquiry as the trial court. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). Although an appellate court reviews a trial court's ruling on a motion for judgment as a matter of law de novo, the scope of the appellate court's inquiry is limited to determining whether the evidence presented below was sufficient to support the verdict. *Bishop of Victoria Corp. Sole v. Corp. Business Park, LLC*, 138 Wn. App. 443, 454, 158 P.3d 1183 (2007).

Washington courts properly deny a motion for judgment as a matter of law under CR 50 when competent and substantial evidence exists to support a verdict. *Bishop of Victoria*, 138 Wn. App. at 454. Substantial evidence exists to support a verdict when the evidence is sufficient to persuade a fair-minded, rational person of its truth. *Bishop of Victoria*, 138 Wn. App. at 454. By challenging a judgment as a matter of law, the party bringing the CR 50 motion admits the truth of all of the

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includes an analysis of the substantial evidence supporting the verdict, West One relies on that section to the extent this court considers arguments on the substantial nature of the evidence.

opposing party's evidence and all reasonable inferences therefrom.[5] *Faust*, 167 Wn.2d at 537-38; *Roth v. Havens, Inc.*, 56 Wn.2d 393, 394, 353 P.2d 159 (1960). Moreover, the court must defer to the fact finder on all issues regarding conflicting testimony, witness credibility, and the persuasive value of the evidence. *Id.* at 538.

1. *Substantial evidence supports West One's breach of warranty claim.*

A warranty is a "promise that a proposition of fact is true. . . . It is intended precisely to relieve the promise of any duty to ascertain facts for himself, and amounts to promise to indemnify promissee for any loss if the fact warranted proves untrue." Black's Law Dictionary, 6th Ed. (1990). A person selling goods creates an express warranty with: "[a]ny affirmation of fact or promise made by the seller to the buyer [that] relates to the good and becomes part of the basis for the bargain . . . that the goods shall conform to the affirmation or promise." RCW 62A.2-313.

Here, the jury found that Mr. and Mrs. Alvarez breached their express warranty to West One, causing West One damages of $3,800. CP at 505-06. This finding is supported by the unambiguous language in the Seller Disclosure form that Mr. and Mrs. Alvarez signed stating that the

[5] West One notes that Mr. and Mrs. Alvarez appear to misapply the standard of review for CR 50 motions in their opening brief by repeatedly dismissing West One's evidence and ignoring the deference that reviewing courts must give to the fact finder. *See* Br. of Appellant at 28-44.

Avalanche's certificate of title "does not indicate that the vehicle is 'REBUILT, SALVAGE, LEMON, OR INSURANCE TOTAL LOSS.'" CP at 7 (emphasis in original). However, in fact, the title to the Avalanche did bear two brands, one of which states on its face "Salvaged—Damaged." CP at 5. Accordingly, even assuming Mr. and Mrs. Alvarez had no understanding of branded titles, such an understanding is not necessary to recall that, when title to your vehicle says "Salvaged—Damaged", you cannot honor a promise to a prospective buyer that the title "does not indicate that the vehicle is . . . salvage . . . ." CP at 5, 7.

Further, the Sellers Disclosure Statement itself informed Mr. and Mrs. Alvarez that West One would rely on the statements it contained in purchasing their trade-in vehicle. CP at 7. West One's evidence confirmed that it had indeed relied on the provisions of the Sellers Disclosure Statement in purchasing the Avalanche as a trade-in vehicle from Mr. and Mrs. Alvarez. CP at 31.

Lastly, West One's evidence showed that it suffered damages occasioned by Mr. and Mrs. Alvarez's breach of their warranty, including the $9,380 that it had paid to Catholic Credit Union to satisfy the purchase money loan that Mr. and Mrs. Alvarez had on the Avalanche. CP at 31; 3 RP at 173-81. West One's evidence also showed, absent the branded title, they would have retailed the Avalanche for $18,988 but that, with the

brand, West One's policies required it to be sold at auction and the median auction value was only $3,800. 3 RP at 179-81. In the meanwhile, the value of the Cadillac that Mr. and Mrs. Alvarez had purchased decreased as they increased its mileage.

Accordingly, substantial evidence supports the jury's finding that Mr. and Mrs. Alvarez breached an express warranty to West One, causing West One $3,800 in damages. CP at 505. This court should affirm.

2. *Substantial evidence supports the jury's finding that West One did not violate RCW 46.70.180(4) or the Consumer Protection Act.*

Under RCW 46.70.180(4), it is unlawful for a motor vehicle dealer "to renegotiate a dollar amount specified as a trade-in allowance on a vehicle delivered or to be delivered by the buyer or lessee as part of the purchase price or lease for any reason *except*: (i) *failure* [of the seller] *to disclose that the vehicle's certificate of ownership has been branded for any reason, including, but not limited to, status as a rebuilt vehicle* . . . ." (emphasis added). Violation of this provision of the Dealer Practices Act also triggers potential liability under the Consumer Protection Act.

West One did not violate the Dealer Practices Act or the Consumer Protection Act. Instead of renegotiating the dollar amount specified in a trade-in allowance, West One sought to rescind the trade-in transaction

when it learned that the Avalanche had a branded title. CP at 31-32, 514-15.

But, even assuming West One's request to rescind the trade-in transaction did constitute a renegotiation of the trade-in allowance, West One was compelled to do so because Mr. and Mrs. Alvarez breached their express warranty that title to the Avalanche was not branded. CP at 39, 505. Thus, West One still did not run afoul of RCW 46.70.180(4) because a dealer may renegotiate a trade-in allowance when a seller fails to disclose that the vehicle's title is branded. *See* RCW 46.70.180(4)(b)(i).

Mr. and Mrs. Alvarez attempt to disclaim any responsibility for their breach of the express warranty by arguing that West One had the burden of discovering the brand despite their express warranty that title was free from brands. This court should reject that approach.

Instead, this court should hold that substantial evidence supports the jury's finding that West One did not violate RCW 46.70.180(4) because it did not attempt to renegotiate the trade-in allowance for the Avalanche. Furthermore, this court should also hold that, even assuming West One did attempt to renegotiate the trade-in allowance, it did not violate Washington law because the renegotiation of the trade-in allowance was caused by Mr. and Mrs. Alvarez's failure to disclose the Avalanche's branded title—and affirmative statement that the title was not

branded. Thus, West One's conduct relating to the Avalanche does not run afoul of RCW 46.70.180(4) or the Consumer Protection Act, which is exactly what the jury concluded after a four-and-a-half day trial. This court should affirm.

C. *Washington courts interpret and apply RCW 4.84.330 consistently and the trial court properly applied the prevailing party analysis set forth in Hertz v. Riebe to this matter.*

Since the trial court concluded that West One failed to mitigate its damages and declined to award West One any damages to compensate it for the breach of warranty, Mr. and Mrs. Alvarez raise this issue so that they can argue that they are the prevailing party under RCW 4.84.330. As such, they argue that they are entitled to their reasonable attorney fees and costs incurred in defending against West One's breach of contract claim. This argument must fail.

As a preliminary matter, West One notes that, although Mr. and Mrs. Alvarez seek direct review of this appeal by the Washington State Supreme Court based on their argument that there is a "festering dispute" between Division I and Division III of the Court of Appeals, they devote only *four* of the *fifty* pages of their brief to addressing the issue. Br. of Appellant at 44-48. In doing so, Mr. and Mrs. Alvarez undermine their own argument that there is a "festering dispute" between the Divisions of the Court of Appeals regarding the prevailing party analysis under RCW

4.84.330. The statute is applied consistently among the different Divisions of the Court of Appeals.

RCW 4.84.330 states:

> In any action on a contract or lease . . . [that] specifically provides that attorney[] fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney[] fees in addition to costs and necessary disbursements. . . .

Thus, RCW 4.84.330 does not explicitly define "prevailing party."

In interpreting and awarding attorney fees under this statute, Washington courts have consistently held that a prevailing party is a party who receives an affirmative judgment in its favor. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009); *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993); *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). In cases where neither party wholly prevails, the substantially prevailing party, as determined by the extent of relief awarded by the court, is the prevailing party for purposes of RCW 4.84.330. *Marassi*, 71 Wn. App. at 916; *Hertz*, 86 Wn. App. at 105. Importantly, however, "if both parties prevail on major issues, an attorney fee award is not appropriate" for either of them. *Marassi*, 71 Wn. App. at 916; *Hertz*, 86 Wn. App. at 105; *see also Lewis v. Orozco*, noted at

142 Wn. App. 1006, *review denied*, 164 Wn.2d 1004 (2008).[6] This Court and all Divisions of the Court of Appeals consistently follow these rules.

In cases where the neither party wholly prevails, Washington courts may apply a proportionality approach to determine which party is the substantially prevailing party for purposes of awarding attorney fees under RCW 4.84.330. *Marassi*, 71 Wn. App. at 916; *Int'l Raceway, Inc. v. JEFJ Corp.*, 97 Wn. App. 1, 8-9, 970 P.2d 343 (1999); *Hertz*, 86 Wn. App. at 105. Both Divisions I and III of the Court of Appeals follow this approach.[7] *See* Division I: *Marassi*, 71 Wn. App. at 916; *Int'l Raceway, Inc*, 97 Wn. App. at 8-9; Division III: *see Moses Lake Const. Co. v. Venture Const. Enter., Inc.*, noted at 134 Wn. App. 1011, 2006.[8]

But a proportionality approach—or an award of attorney fees for either party—is not appropriate if both parties prevail on major issues. *Marassi*, 71 Wn. App. at 916. This is supported because RCW 4.84.330 does not define the prevailing party as one who prevailed on a claim that

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[6] Although unpublished, the *Lewis* case is noteworthy because it addresses application of RCW 4.84.330 in the context of a transaction between a motor vehicle dealer and a customer litigating claims under the parties' contract and the CPA. Moreover, *Lewis* is also noteworthy because the Alvarezes' counsel, David Trujillo, served as counsel for Mr. Lewis and the Supreme Court denied review of Division I's decision.

[7] Division II does not appear to have issued an opinion specifically addressing this issue.

[8] As with *Lewis, supra*, this unpublished case shows that Division III's application of RCW 4.84.330 is consistent with Division I. West One does not cite to either of these cases as precedential authority. Instead, they are simply being cited to show the consistency between Divisions of the Court of Appeals.

authorizes attorney fee awards. Instead, it focuses on the relief afforded to all parties for the entire lawsuit without regard to whether the underlying dispute authorizes an award of attorney fees. *See Hertz*, 86 Wn. App. at 105; *see also McGary v. Westlake Investors*, 99 Wn. App. 280, 661 P.2d 971 (1983).

In arguing that there is a "festering dispute" between Divisions I and III of the Court of Appeals, the Alvarezes conflate the opinions regarding awarding attorney fees to the substantially prevailing party under RCW 4.84.330, when the proportionality analysis comes into play, with the opinions where no award of attorney fees is warranted under RCW 4.84.330 because both parties prevail on major issues. Both Division I and Division III cite to *Marassi* in support of the proportionality approach to determine which party is the substantially prevailing party for purposes of RCW 4.84.330. Both Division I and Division III also cite to *Marassi* in support of the rule that an award of attorney fees is not appropriate under RCW 4.84.330 when both parties prevail on major issues.

The Alvarezes claim that denying their request for attorney fees was a "needless penalty against consumers *who would have otherwise* received a large RCW 4.84.330 fee award but for the mere fact that they attempted to actively enforce the CPA . . . ." Br. of Appellant at 8. This argument,

however, is based on the false premise that the Alvarezes would certainly have received an attorney fee award under RCW 4.84.330 but for their unsuccessful CPA claim. That premise is false because both the jury and the judge concurred that West One established its breach of warranty claim. CP at 505, 514-15. Moreover, the premise is based on a hypothetical because the Alvarezes did choose to assert a CPA claim and to vigorously litigate that claim. They lost. CP at 504-05. This court should not reverse the trial court's attorney fee ruling based on a hypothetical and a false premise.

In addition, the argument is flawed because the trial court's decision did not penalize them for having asserted the CPA claim. Under the CPA, the Alvarezes only would have recovered attorney fees in the event they were successful in pursuing their claim. Even if this case had only involved a CPA claim, the Alvarezes would still not have received an award of attorney fees, because the jury determined that West One had not violated the CPA. As much as the Alvarezes may disagree with the jury's decision, the jury was not convinced by the Alvarezes' claim that West One had violated the CPA.

Moreover, the Alvarezes cannot claim that a denial of attorney fees is unfair to them and against public policy because they had their attorney's fees and costs capped pursuant to their agreement with their counsel at

$10,000. CP at 644. While not an insignificant amount, the Alvarezes are not out-of-pocket the amount their counsel requested in attorney fees. They and their counsel chose to assert and aggressively pursue the CPA claim in the hopes of prevailing. But they did not prevail. Accordingly, an attorney fee award under RCW 4.84.330 in their favor is not appropriate and this court should affirm the trial court and reject the Alvarezes' proposed analysis.

D. *After the jury found that Mr. and Mrs. Alvarez breached their express warranty that title to the Avalanche was not branded, the trial court erred in entering judgment in their favor based on its conclusion that West One failed to mitigate its damages.*

The doctrine of mitigation of damages may prevent an injured party from recovering damages that could have been avoided if that party had taken reasonable efforts to mitigate the damages after the injury. *TransAlta Centralia Generation, LLC v. Sickelsteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006). However, an injured party has "wide latitude" and is required only to act reasonably in mitigating the damages. *TransAlta*, 134 Wn. App. at 825-26. Under both the common law and chapter 62A.2 RCW, a breaching seller may assert the doctrine of mitigation of damages as an affirmative defense. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 434, 886 P.2d 172 (1994).

As an affirmative defense, the breaching seller bears the burden of proving that the injured buyer acted unreasonably in mitigating the damages. *Federal Sign Corp.*, 125 Wn.2d at 434, 437-38 (noting that the breaching seller failed to meet its burden of proving that the injured seller's mitigation efforts were unreasonable because the only evidence regarding mitigation came from the injured buyer). Importantly, unsuccessful efforts to mitigate damages do not preclude an injured buyer from recovering damages as long as the mitigation efforts were reasonable. *Federal Sign Corp.*, 125 Wn.2d at 437. Appellate courts review a trial court's ruling that a party failed to mitigate its damages for substantial evidence. *See Bernsen v. Big Bend Elect. Co-op, Inc.*, 68 Wn. App. 427, 435, 842 P.2d 1047 (1993).

Here, West One acted reasonably in mitigating its damages after it learned that Mr. and Mrs. Alvarez had breached their warranty that title to the Avalanche was free from brands. Because title to the Avalanche was branded, repairing the Avalanche as a means of mitigating damages was not possible. Accordingly, West One promptly contacted Mr. Alvarez and initiated discussions on curing the problem through rescission. CP at 84-85; 514-15; 3 RP at 297-99. Even though West One had already paid off the $9,380 purchase money loan on the Avalanche when it discovered that Mr. and Mrs. Alvarez had breached their warranty regarding the

Avalanche's title, West One and its counsel negotiated with Mr. and Mrs. Alvarez and their counsel to rescind the trade-in transaction. CP at 31, 84-85. In negotiating to rescind the trade-in transaction, West One offered to release all legal interest in the Avalanche to the Alvarezes in exchange for tender of the $14,000 trade-in credit. CP at 84-85. However, Mr. and Mrs. Alvarez declined, informing West One that they could not afford to repay West One for the trade-in credit on the Avalanche and also make the payments on the Cadillac. CP at 515.

Instead, Mr. and Mrs. Alvarez eventually offered to rescind the entire transaction, returning the Cadillac to West One and retaking the Avalanche in exchange for tendering payment of $9,380 to West One to reimburse West One for paying off their purchase money loan with Catholic Credit Union. *See* CP at 514-15; 3 RP at 297-99; 5 RP at 611-12. Accordingly, the Alvarezes eventually agreed to rescind the deal without compensating West One in any way for their breached warranty or use of the Cadillac or for West One's lost profits, an offer which West One reasonably declined.

Because West One acted reasonably in promptly contacting Mr. Alvarez upon discovering that title to the Avalanche was branded, in attempting to negotiate to rescind the trade-in transaction, and in declining the Alvarezes' one-sided offer to rescind, the trial court erred in

concluding that West One failed to mitigate its damages. While West One's mitigation attempts to mitigate were unsuccessful, they were not unreasonable. Thus, this court should reverse the trial court's judgment based on that conclusion and, instead, should award West One the $3,800 in damages according to the jury's verdict.

VI. CONCLUSION

Based on the foregoing, West One respectfully requests that this court affirm the jury verdict and judgment that Mr. and Mrs. Alvarez breached their express warranty, thereby causing West One damages, and that West One did not violate RCW 46.70.180(4) and the Consumer Protection Act. West One further requests, however, that this court reverse the trial court's ruling on the Alvarezes' affirmative defense, which formed the basis of the trial court's judgment denying it recovery on its breach of contract claim based on the court's conclusion that West One did not reasonably mitigate its damages.

DATED this 27th day of September 2013.

DAVIES PEARSON, P.C.

Christopher J. Marston, WSBA #30571
Ingrid McLeod, WSBA #44375
Attorneys for West One Automotive Group
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

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Dear Clerk – Attached is the Brief of Respondent/Cross Appellant and an Affidavit of Service for filing with the court. Thank you.

Kathy Kardash
Legal Assistant to Brian M. King
Christopher J. Marston
DAVIES PEARSON, P.C.
920 Fawcett / P.O. Box 1657
Tacoma, WA 98401-1657
Phone: (253) 620-1500
Fax: (253) 572-3052