NO. 90729-3

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.

West One Automotive Group, Inc.'s Answer to Samuel Alvarez and Roberta Alvarez's Petition for Review

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. ISSUES PRESENTED FOR REVIEW

In their Petition for Review, Samuel and Roberta Alvarez (hereinafter the "Alvarezes") seek review of the Court of Appeals' unpublished opinion in Case Number 32222-0-III because it: (1) affirmed the trial court's denial of their CR 50 motion for judgment as a matter of law, and (2) affirmed the trial court's denial of their request for attorney fees under RCW 4.84.330. Should this Court grant the Alvarezes' Petition, then West One also asks that this court review: (3) the Court of Appeals' affirmance of the trial court's conclusion that it failed to mitigate its damages.

II. STATEMENT OF THE CASE

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 that they owned. CP at 4, 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, a West One salesperson informed him that he was struggling with "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 its salesperson $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 paid off the Alvarezes' $9,380 loan on the Avalanche. 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. The Avalanche's title showed two brands dated August 3, 2004, one from Oregon stating "Salvaged—Damaged" and one from Washington stating "Not Actual."[1] 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

[1] 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.

its retail value would have been approximately $19,325 *if* it was free from 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.

Thereafter, West One and the Alvarezes had continued discussions in which they attempted to unwind the Avalanche trade-in transaction; however, those discussions ultimately proved unsuccessful. CP at 31-32. Accordingly, West One filed suit against the Alvarezes for rescission of the trade-in transaction and damages occasioned by their breach of warranty in the Sellers Disclosure Statement. CP at 3-7, 32. Eventually, the Alvarezes 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.

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.

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. 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 the Alvarezes' breach of warranty, turning to equity, 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.

III. ANALYSIS

This Court will accept review of a Court of Appeals decision in only limited circumstances, namely:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The Alvarezes have failed to establish that any of the four limited circumstances in which this Court may accept review of a Court of Appeals decision apply. Consequently, this Court should deny the Alvarezes' Petition for Review.

1. *There is no basis for this Court to review the trial court's denial of the Alvarezes' CR 50 motion for judgment as a matter of law.*

The Alvarezes argue extensively that the Court of Appeals erred in affirming the trial court's denial of their motion for judgment as a matter of law on both West One's breach of contract claim and their cross-claims for relief under consumer protection statutes. *Pet.* at 2-3, 9-11, 12-19. In doing so, the Alvarezes fail to cite to RAP 13.4 or to any of its specific criteria that outline the limited circumstances under which this Court may accept review of a Court of Appeals' decision. *See Pet.* at 2-3, 9-11, 12-19. Instead, the Alvarezes attempt to re-litigate the merits of their defense to West One's breach of contract claim and their consumer protection-based cross-claims. *See Pet.* at 2-3, 9-11, 12-19.

Although appellate courts review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, the scope of the appellate court's inquiry is limited to determining if the evidence presented at trial was sufficient to support the verdict. *Bishop of Victoria Corp. v. Corp. Business Park, LLC*, 138 Wn. App. 443, 454, 158 P.3d 1183 (2007). Washington courts properly deny a CR 50 motion when competent and substantial evidence exists to support a verdict. *Bishop of Victoria*, 138 Wn. App. at 454. Substantial evidence to support a verdict exists 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 under CR 50, the moving party admits the truth of all of the opposing party's evidence and all reasonable inferences therefrom. *Faust v. Albertson*, 167 Wn.2d 531, 537-38, 222 P.3d 1208 (2009); *Roth v. Havens, Inc.*, 56 Wn.2d 393, 394, 353 P.2d 159 (1960). The court must also defer to the fact finder on all issues of conflicting testimony, witness credibility, and the persuasive value of the evidence. *Faust*, 167 Wn.2d at 538.

Here, substantial evidence supports the verdict in favor of West One on its breach of warranty claim and its defense of the Alvarezes' consumer protection claims.

First, although the Alvarezes devote the majority of their argument to re-litigating their claims under the Consumer Protection Act and the Washington Dealer Practices Act, they assert that they should have prevailed on their motion for judgment as a matter of law on West One's breach of warranty claim. *See Pet.* at 4. A seller of goods creates an express warranty with "[a]ny affirmation of fact or promise made by the seller to the buyer [that] relates to the goods and becomes part of the basis of the bargain . . . that the goods shall conform to the affirmation or promise." RCW 62-A.2-313(a).

The Alvarezes were the sellers of the trade-in Avalanche, which West One purchased. CP at 5-7, 31, 193-95. The Alvarezes ignore the fact that they signed a document entitled "Sellers Disclosure Statement for Trade-In Vehicle" under which they "certf[ied], warrant[ed], and declare[d] under the penalty of perjury" that their trade-in Avalanche had not been salvaged. *See Pet.* at 4; CP at 7, 836. West One relied on the Alvarezes' warranty in agreeing to purchase the Avalanche as a trade-in. CP at 31, 193-95. Shortly after finalizing the transaction with the Alvarezes, West One paid off the $9,380 outstanding on the Alvarezes' loan on the Avalanche. CP at 837. The Avalanche, however, had been salvaged and, as such, had a branded title that reduced its value by 20-to-50-percent. 3 RP at 177; CP at 5. Accordingly, substantial evidence supports the jury's finding that the Alvarezes breached their express warranty to West One and, thus, the trial court correctly denied their CR 50 motion.

Second, substantial evidence supports the jury's finding that West One did not violate the Consumer Protection Act or the Auto Dealers Practices Act. While the Alvarezes argue extensively that West One improperly attempted to re-negotiate the Avalanche's trade-in price, that assertion is unsupported.

Under the Auto Dealers Practices Act, 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* . . . ." RCW 46.70.180(4)(b)(i)(emphasis added). A motor vehicle dealer's violation of chapter 46.70 RCW also could give rise to liability under the Consumer Protection Act. RCW 46.70.310.

Here, West One did not violate either the Auto Dealer's Practices Act or the Consumer Protection Act. Instead of re-negotiating the dollar amount specified in the trade-in allowance, West One sought to rescind the trade-in transaction when it learned that the Avalanche had a branded title. CP at 31-31, 514-15. Moreover, even assuming that West One's attempt to rescind the Avalanche trade-in transaction did constitute a re-negotiation of the trade in allowance, West One's action was driven by the Alvarezes' breach of their express warranty that the Avalanche's title was free from brands. CP at 39, 505. West One still did not violate the Auto Dealers Practices Act or the Consumer Protection Act because a dealer may re-negotiate a trade-in allowance when a seller fails to disclose that the trade-in vehicle's title is branded. RCW 46.70.180(4)(b)(i). The jury considered this argument by the Alvarezes and rejected it.

Because substantial evidence supports the jury's findings that the Alvarezes did breach their express warranty to West One regarding the condition of the Avalanche's title and that West One did not violate RCW 46.70.180(4)(b), the trial court properly denied the Alvarezes' CR 50 motion. Further, not only was denial of the Alvarezes' CR 50 motion proper, there is no basis under RAP 13.4 under which this Court should grant review of the trial court's denial of the Alvarezes' CR 50 motion. This Court should deny the Alvarezes' Petition.

2. *There is no basis for this Court to review the denial of the Alvarezes' request for attorney fees under RCW 4.84.330.*

Although the Alvarezes fail to cite to RAP 13.4 in their Petition, in the limited portion of their Petition that they devote to the denial of their attorney fees under RCW 4.84.330, they appear to allude to: (A) a conflict between decisions from Division I and Division III of the Court of Appeals' interpretation of RCW 4.84.330 and (B) an apparent conflict between Division III's analysis of RCW 4.84.330 and public policy. *See Pet.* at 4-5, 11-12, 20. Despite the Alvarezes' assertions that Division III's unpublished opinion in this case illustrates a conflict between Washington appellate courts (it does not) and with public policy (it does not), these are nothing more than bald assertions that the Alvarezes fail to support with any analysis whatsoever. *See Pet.* at 4-5, 11-12, 20. Further,

notwithstanding the Alvarezes' lack of analysis, their assertions lack merit, and, thus, this Court should deny their Petition.

A. *There is not an unresolved conflict within the Court of Appeals in applying RCW 4.84.330.*

As a threshold matter, although West One commenced this suit as a breach of warranty action, after the jury found in favor of West One on its breach of warranty claim and on its affirmative defense against the Alvarezes' consumer claims, the trial court ultimately resorted to equitable grounds in resolving the case. *See* CP at 505-06, 826-28. Where a case is resolved in equity and not on the basis of enforcing written contract provisions, RCW 4.84.330 does not apply. *Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 782, 275 P.3d 339 (2012). Because this case was resolved in equity when the trial court concluded that West One had failed to mitigate its damages and denied it any recovery on its successful breach of warranty claim, even if this Court does wish to address precedent regarding the application of RCW 4.84.330, this is not the proper case. Thus, this Court should deny the Alvarezes' Petition.

Moreover, assuming RCW 4.84.330 properly applied here, Washington courts consistently apply it. RCW 4.84.330 states:

> In any action on a contract . . . where such contract . . . specifically provides that attorney[] fees and costs, which are incurred to enforce the provisions of such contract . . ., shall be awarded to the prevailing

> party, whether he or she is the party speficied in the contract . . . or not, shall be entitled to reasonable attorney[] fees.

For purposes of RCW 4.84.330, the prevailing party is the 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). In cases where neither party wholly prevails, the substantially prevailing party for purposes of RCW 4.84.330 is determined by the extent of relief awarded by the court. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) (Division I)[2]; *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006) (Division I); *Wright*, 167 Wn. App. at 783 (Division II); *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997) (Division III). "[I]f both parties prevail on major issues, an attorney fee award is not appropriate" for either party under RCW 4.84.330. *Marassi*, 71 Wn. App. at 916; *Wright*, 167 Wn. App. at 783; *Hertz*, 86 Wn. App. at 105. This result is supported because RCW 4.84.330 does not define the prevailing party as one who prevailed on a claim that authorizes an award of attorney fees; instead, it focuses on the relief afforded to all parties for the entire lawsuit without regard to whether the claims on which the party prevailed authorizes an award of attorney fees. *See Hertz*, 86 Wn. App. at 105; *see*

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[22] The Alvarezes do not cite to *Marassi* in their Petition for Review. *See Pet.* at iii-iv, 4-5.

also Int'l Raceway, Inc. v. JEFJ Corp., 97 Wn. App. 1, 8, 970 P.2d 343 (1999); *see also McGary v. Westlake Investors*, 99 Wn. App. 280, 661 P.2d 971 (1983).

In cases where neither party wholly prevails, still looking to the extent of relief granted, 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*, 97 Wn. App. at 8-9; *Hertz*, 86 Wn. App. at 105. Both Divisions I and III of the Court of Appeals follow this approach. *See id.*

In arguing that there is an unresolved conflict 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.

Accordingly, there is no unresolved conflict between Division I and Division III warranting this Court's review of the Court of Appeals' opinion in this case.

B. *The Court of Appeals' opinion does not conflict with public policy.*

The Alvarezes appear to argue that the Court of Appeals' opinion affirming the denial of their requested attorney fees under RCW 4.84.330 conflicts with public policy that is broadly in favor of consumers. *See Pet.* at 4-5. The Alvarezes are incorrect. While the Consumer Protection Act does authorize awards of attorney fees, in order to encourage its active enforcement by consumers, awards of attorney fees may only be made if the consumer prevails. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 594-95, 675 P.2d 193 (1983). In cases where the consumer fails to prevail, the consumer is not entitled to an award of attorney fees. *See* RCW 19.86.090.

Although the Alvarezes vigorously pursued the claims, they did not prevail on their counterclaims under the Consumer Protection Act and the Auto Dealers Practices Act, *see*, CP at 504-05, and were not entitled to an award of attorney fees under the Consumer Protection Act. The jury and the judge both found that the Alvarezes breached their warranty to West One and that West One had not violated the Auto Dealers Practices Act or the Consumer Protection Act. CP at 505, 514-15. Therefore, the judge's

denial of their request for attorney fees is the same outcome they would have received had this only been a case involving their consumer protection claims.

And, even if they had not asserted their consumer protection claims, they still would not have received an award of their attorney fees under RCW 4.84.330 because that statute does not apply, as the court resolved the case in equity. *See Wright*, 167 Wn. App. at 782. Setting this aside, the Alvarezes' argument is based on speculation and conjecture as to what may have happened during the trial had they not asserted their consumer protection claims, but they did assert them and aggressively pursued them to no avail. The fact that, under the circumstances present here, the Alvarezes are not entitled to an award of attorney fees under RCW 4.84.330 because neither party prevailed can have no chilling effect on public policy in consumer matters.

The Alvarezes' claims that the Court of Appeals' unpublished opinion in this case conflicts with public policies behind the Consumer Protection Act must fail. This Court should deny the Alvarezes' Petition.

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IV. CONCLUSION

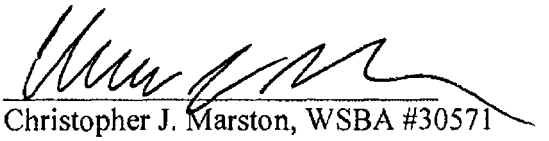
The Alvarezes have failed to establish that any of the criteria governing this Court's acceptance of review of a Court of Appeals decision is present. Indeed, the Alvarezes can make no such showing. Instead, the Alvarezes attempt to re-litigate the merits of their claims by arguing at length that the Court of Appeals erred in affirming the trial court's denial of their CR 50 motion for judgment as a matter of law. But re-litigating the merits of the claims in this case is not an acceptable reason for this Court to accept review of the Court of Appeals' opinion.

Additionally, although the Alvarezes make cursory references to: (A) a conflict between opinions from Division I and Division III regarding the prevailing party analysis under RCW 4.84.330 and (B) a conflict between the Court of Appeals' unpublished opinion in this case and public policies underlying the Consumer Protection Act, they provide no analysis of those assertions. This Court should deny the Alvarezes' unsupported Petition because Washington courts apply RCW 4.84.330 consistently, and the Court of Appeals' decision in this matter does not conflict with the public policies behind the Consumer Protection Act.

In the alternative, should this Court grant the Alvarezes' Petition, it should also review the Court of Appeals' holding that the trial court correctly found that West One failed to mitigate its damages.

DATED this 29th day of September 2014.

DAVIES PEARSON, P.C.



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Dear Clerk – Attached is West One Automotive Group, Inc.'s Answer to Samuel Alvarez & Roberta Alvarez's Petition for Review and Affidavit of Service for filing with the Court today. Thank you.

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