322220

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.

REPLY 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

Cases **Page**

Statutes

Other Authorities

I. INTRODUCTION

This court should reverse the trial court's ruling that West One failed to mitigate its damages and remand for entry of the jury's damage award because the trial court: (1) improperly shifted the burden of proving the Alvarezes' failure to mitigate affirmative defense to West One and (2) overlooked the substantial evidence supporting a finding that West One acted reasonably in working to mitigate its damages once it learned that the Alvarezes breached their express warranty.

II. REPLY

A. *Standard of Review*

The Alvarezes claim that this court's review of the trial court's ruling that West One failed to mitigate its damages is for an abuse of discretion. Reply Br. of Appellants at 48. In making this assertion, however, the Alvarezes rely only on general authority regarding a trial court's exercise of equitable discretion and overlook authority holding that appellate courts review a trial court's findings on the failure to mitigate affirmative defense for substantial evidence and conclusions of law de novo. *Bernsen v. Big Bend Elect. Co-op, Inc.*, 68 Wn. App. 427, 435, 842 P.2d 1047 (1993); *Scott's Excavating Vancouver v. Winlock Properties, LLC*, 176 Wn. App. 335, ¶22, 308 P.3d 791 (2013). Substantial evidence exists if the evidence is sufficient to persuade a rational, fair-minded person of its truth. *Bishop*

of Victoria Corp. v. Corp. Business Park, LLC, 138 Wn. App. 443, 454, 158 P.3d 1183 (2007).

Accordingly, despite the Alvarezes' contention, this court should review the trial court's factual findings on mitigation of damage for substantial evidence and should review the trial court's legal conclusions de novo.

B. *The trial court improperly shifted the burden of proof.*

The doctrine of mitigation of damages is 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 "pleading, production, and persuasion" that the injured buyer acted unreasonably in mitigating the damages. *Federal Sign Corp.*, 125 Wn.2d at 437-38.

Here, however, although the trial court noted that it would treat the Alvarezes as having the burden of establishing their failure to mitigate affirmative defense, the trial court erred by ultimately shifting the burden to West One. *See* CP at 842; RP at 583. Specifically, the trial court erred in relying on *Bullard v. Bailey*, 91 Wn. App. 750, 959 P.2d 1122 (1998), a tort case, over *Federal Sign Corp.* in impermissibly shifting the burden on the Alvarezes' failure to mitigate affirmative defense to West One based

on its conclusion that West One's "gross ineptness caused its damages." *See* CP at 842-44.

Instead, the trial court should have left the burdens of pleading, production, and persuasion on the Alvarezes—the breaching sellers of the Avalanche—in accordance with *Federal Sign Corp.* Although the trial court stated that "regardless of which party has the burden of proof . . . [West One] could have substantially avoided its damages . . . .[,]" the trial court's conclusions are based on the premise that West One acted unreasonably in mitigating its damages, an issue on which the Alvarezes should have born the burden of proof. *See Federal Sign Corp.*, 125 Wn.2d at 437-38; CP at 843.

However, because the trial court improperly shifted the burden of proof to West One, the trial court's analysis of the Alvarezes' failure to mitigate affirmative defense was obscured by the heightened burden it imposed upon West One, which necessarily impacted its ultimate conclusion that West One failed to mitigate its damages. This court should reverse the trial court's ruling that West One failed to mitigate its damages because, as discussed below, West One acted reasonably at the time and under the circumstances in responding to the Alvarezes' breached warranty.

///

C. *West One acted reasonably in working to mitigate its damages.*

Although the doctrine of mitigation of damages may prevent an injured party from recovering its contractual damages if those damages could have been avoided by reasonable efforts to mitigate the damages after the injury, the party suffering the breach has a "wide latitude" of discretion in mitigating its damages. *TransAlta Centralia Generation, LLC v. Sickelsteel Cranes, Inc.*, 134 Wn. App. 819, 825-26, 142 P.3d 209 (2006). Specifically:

> A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Winlock Properties, LLC, 176 Wn. App. at ¶23 (quoting *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004)). "The effort to mitigate need only appear reasonable . . . in the context of the time in which the decision was made." *Winlock Properties*, 176 Wn. App. at ¶23.

Unsuccessful efforts to mitigate damages do not preclude an injured buyer from recovering damages for a contractual breach as long as the buyer's efforts to mitigate their damages were reasonable. *Federal Sign*

Corp., 125 Wn.2d at 437. Thus, the reasonableness of the injured party's response is the dispositive inquiry. *See id.*

Instead, the Alvarezes attempt to limit their response to relitigating their consumer protection claims, which the jury considered and rejected, by incorrectly asserting that they had "offered rescission in toto, but [West One] refused and insisted on demanding back . . . all of the trade-in credit, an action expressly banned by RCW 46.70.180(4)(b) . . . ." Reply Br. of Appellant at 49. Thus, the Alvarezes argue only that West One did not properly mitigate its damages because its "wide latitude" to do so cannot include "the perpetration of illegal, criminal, anti-consumer acts against a customer in direct violation of RCW 46.70.180(4)(b), RCW 46.70.140, [and] RCW 19.86.020 . . . ." Reply Br. of Appellants at 49.

In making this argument, the Alvarezes ignore the law and West One's reasonable attempts to resolve this dispute. Their argument overlooks the law because RCW 46.70.180(4)(b) actually states that it is unlawful for a dealer to "renegotiate a dollar amount specified as a trade-in allowance on a vehicle delivered or to be delivered by the buyer . . . as part of the purchase price . . . for any reason *except (i) failure 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).

Even assuming for the sake of argument that West One attempted to renegotiate the trade-in allowance on the Alvarezes' Avalanche, doing so did not run afoul of RCW 49.70.180 because the Alvarezes breached their express warranty that the Avalanche's title was free from brands.[1] CP at 7, 836, 842.

Moreover, the Alvarezes' response to West One's cross appeal ignores the substantial evidence supporting a finding that West One acted reasonably in mitigating its damages after it learned that Mr. and Mrs. Alvarez had breached their express warranty that title to their Avalanche was free from brands.

After West One discovered the Alvarezes' had breached their warranty, its available options to mitigate its damages were limited. For example, West One could not mitigate its damages by simply repairing the Avalanche because its title was branded. Moreover, West One could not mitigate its damages through cover because it had already paid for the Avalanche when it discovered the Alvarezes' breached warranty.

Thus, West One attempted to mitigate its damages by rescinding the trade-in transaction. Although West One had already paid off the $9,380 outstanding on the Alvarezes' purchase money loan for the Avalanche,

[1] In accordance with RAP 10.3(c), West One limits its reply to the issues presented in its cross appeal and relies on its previous briefing in opposition to the issues raised by the Alvarezes appeal.

West One contacted Mr. Alvarez promptly after discovering the Avalanche's title was branded and initiated discussions on rescinding the Avalanche transaction. CP at 31, 84-85; 514-15; 3 RP at 297-99.

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 $9,380[2] that West One had paid to satisfy the amount outstanding on the Alvarezes' purchase money loan for the Avalanche, which comports with the mandates of RCW 49.70.180(4)(b). CP at 84-85. But the Alvarezes declined West One's attempt to mitigate, informing West One that they could not afford to repay West One for the Avalanche's trade-in credit 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. While the Alvarezes eventually agreed to rescind the Avalanche trade-in

[2] When West One's Yakima sales manager offered to rescind the Avalanche transaction for $9,380, he did not realize that West One had given the Alvarezes $14,000 as a trade-in credit; however, he would have soon learned of the trade-in credit and corrected West One's rescission offer so that it required payment of $14,000 instead of $9,380. CP at 838.

and Cadillac purchase transactions, they agreed to do so only if they did not have to compensate West One in any way for their breached warranty or for their use of the Cadillac or for West One's lost profits. *See* CP at 514-15; RP at 297-99, 611-12. West One acted reasonably in denying this one-sided offer, which the Alvarezes made months after they traded-in the Avalanche. *See id.*

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 Avalanche transaction, and in declining the Alvarezes' one-sided offer to rescind the Avalanche and Cadillac transactions. The trial court erred in ruling that West One failed to mitigate its damages. Though West One's mitigation attempts were ultimately unsuccessful, they were reasonable at the time and in the context that West One made them. Thus, this court should reverse the trial court's judgment based on its erroneous ruling that West One failed to mitigate its damages and should remand for entry of the jury's damage award.

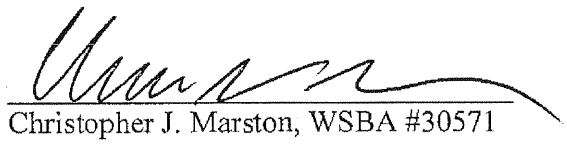
III. CONCLUSION

West One respectfully requests that this court affirm the jury verdict and judgment that: (1) Mr. and Mrs. Alvarez breached their express warranty, (2) the Alvarezes' breached warranty caused West One

damages, and (3) West One did not violate RCW 46.70.180 or the Consumer Protection Act. However, West One requests that this court reverse the trial court's ruling on the Alvarezes' affirmative defense based on the trial court erroneously shifting the burden of proof to West One and overlooking the substantial evidence that West One acted reasonably in mitigating its damages. This court should reverse and remand for entry of the jury's damage award for West One on its contract claim.

DATED this 25th day of November 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

im / s:\12xxx\126xx\12698\7\supreme court action\pleadings\reply br. of resp't - cross appellant.doc

OFFICE RECEPTIONIST, CLERK

From: Kathy Kardash <kkardash@dpearson.com>
Sent: Monday, November 25, 2013 1:54 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Christopher J. Marston; Ingrid McLeod
Subject: West One Automotive Group v. Alvarez - Supreme Court Case No.: 88385-8
Attachments: Reply Brief of Respondent~Cross Appellant.PDF; Affidavit of Service of Reply Brief of Respondent~Cross Appellant.PDF

Dear Clerk – Attached are the following documents for filing with the court:

1. Reply Brief of Respondent/Cross Appellant; and
2. Affidavit of Service of Reply Brief of Respondent/Cross Appellant.

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