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Case No. 88385-8

SUPREME COURT

STATE OF WASHINGTON

West One Automotive Group, Inc.
d/b/a Hertz Car Sales

Respondent/Appellee,

v.

Samuel C. Alvarez and Roberta A. Alvarez,
husband and wife, and the marital
community comprised thereof,

Appellants.

APPELLANTS' REPLY BRIEF

DAVID B. TRUJILLO
WSBA NO. 25580
Attorney for Appellants
4702A Tieton Drive
Yakima, WA 98908
(509)972-3838 Phone
tdtrujillo@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

I. APPELLANTS' REPLY TO THE RESPONDENT CAR DEALER'S FACTUAL CLAIMS AND ARGUMENTS MADE TO THIS COURT:

A. Respondent claims: "... AFTER ACCEPTING the trade-in from Mr. and Mrs. Alvarez BASED ON THE WARRANTY [PE-1.3]." Respondent's September 27th, 2013 Brief (RB), page 2, lines 1-2 (Emphasis added). However, the above Respondent's statement to this Court is false and directly contradicted by all the uncontested facts. Actually, the Respondent's finance manager, Mr. Jim Prunier, admitted at trial that when he gets the deal file with everything gathered from the customer and put together for him from the salesman (Mr. Joseph Harris), AN AGREEMENT HAS ALREADY BEEN REACHED BETWEEN THE SALESMAN AND THE CUSTOMER, and Mr. Prunier just uses the information in the salesman's deal file handed to him in order to type up all the final paperwork for the signatures that are all that is needed to complete a final and binding deal. RP-102, line 4 to RP-103, line 11 (Emphasis added).

The sales documents to finalize the deal were written up by Jim Prunier after he got the deal file from salesman Joseph Harris and they included PE-1.1 (the Vehicle Sales Order), PE-1.2 (the Retail Installment Contract), and PE-1.4 (the Authorization to Pay Off the customer's Trade-in

Vehicle), which documents were all admitted into evidence at trial. Mr. Alvarez testified to those being the sales contract papers he signed. RP-254, lines 4-22. This Court will also readily observe, the contract documents (PE-1.1. and 1.2 and 1.4) for this sale include the Respondent's acceptance of the trade-in vehicle, all do not contain any cooling-off period, no right of rescission, no right to change your mind or right to back out, and no right to further inspection or reflection. Id.

With regard to "the agreement already reached" between the salesman Joseph Harris and the customers Alvarez, and before Jim Prunier was given the deal file from Harris so Prunier could write up the deal, the Respondent also admitted:

> 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.

Respondent's Brief, page 2, paragraph 2 (Emphasis Added).

During the Respondent's above-described physical inspection of the trade-in vehicle and taking copies of the certificates of registrations (PE-1.7, page 3 and DE-10), and prior to accepting the trade-in vehicle, the salesman Mr. Harris actually filled out a trade-in worksheet wherein he inspected the proposed trade-in vehicle to gather information on things like the number of miles the trade-in vehicle showed on its odometer on the driver's side dash display of the vehicle, and the year, make, model, VIN, equipment level, and the condition of the vehicle. RP-192, lines 1-8. On that point, Mr. Alvarez provided unrefuted corroborating testimony at trial regarding Mr. Harris's admitted inspection as follows:

> He [Mr. Harris] went inside, grabbed a clipboard, had a sheet of paper, a form that he was filling out, got my name, he asked me if I had a copy of the registration. I said I did. So I went around and grabbed it. He said if he could get – he

wanted the key so he could turn the ignition and check the mileage.

. . . He [Mr. Harris] was – most of the time he was on the driver's side.

RP-243, lines 10-21.

We were out at the car for at least a half an hour just taking notes, taking down all the options, popped the hood. He was, you know, going through the whole car.

RP-244, lines 21-23. Mr. Alvarez testified further as follows:

Q: Okay. Did he [Mr. Harris] look inside the vehicle?

A: Yes.

Q: And did you say he was standing on the driver's side?

A: Most of the time, yes.

RP-245, lines 1-5.

While Mr. Harris was standing at the opened driver's door to examine the vehicle and recording its mileage, features and condition, it is undisputed that the distinct and reflective State Patrol Salvage Sticker (DE-9) was prominently displayed in the RCW 46.12.075 statutorily designated location

for branded-title vehicles, and was openly displayed in plain view. RP-245, lines 3-13. Mr. Harris admitted, at the very least, that they (the Respondent) finally took notice of that very same salvage sticker, still sitting right on the RCW 46.12.075 statutorily designated door panel, within a week. RP-200, lines 15-25. Mr. Prunier, who processed the deal after Mr. Harris passed it to him, also testified as follows:

> Q: Okay. Where can you tell or what things can you check on to see whether a vehicle has a branded title?
>
> A: Door jamb of the car, there's a state inspection on it. They've got to be certified by the state, should be a sticker on the inside of the door.
>
> Q: Okay.
>
> A. [Also, the] Registration and [the] title.
>
> Q: Is that very difficult to check for?
>
> A: No it's not.
>
> . . .
>
> A: [Also] Carfax.
>
> Q: Okay. And in fact in May of 2008 didn't Hertz have a subscription to Carfax? A membership?

A: They [the Respondent] had a membership with one, yes sir.

. . .

Q: And [the Respondent] could have run the VIN number [of the trade-in vehicle through the Respondent's Carfax database to check for a branded title]?

A: Yeah.

RP-113, lines3-25.

Mr. Prunier then confirmed that the deal file he then gets from the salesman (in this case, Mr. Joseph Harris) who performs the inspection and gathers the copy of the registration, should always include a copy of the trade-in vehicle's certificate of registration gathered from the customer and then put into the deal file by the salesman. RP-102, line 17 to RP-103, line 3. All Mr. Prunier needed to see, in order to write up all the final sales paperwork to be signed in order to consummate and complete the agreed upon transaction into a final and binding deal, is the agreed sales price and a copy of the vehicle registration. RP-103, lines 7-11.

Salesman Harris's trial testimony (consisting of his deposition

testimony) admitted it was his normal practice to take a copy of the customer's trade-in vehicle registration. RP-193, lines 1-11. Mr. Harris testified that he then puts the photocopy of the customer's proposed trade-in vehicle's into a deal jacket (deal file) to give to the finance office, where finance manager Jim Prunier worked. RP-196, lines 3-10.

The Respondent's CFO, Kathy Wigmosta, finally confessed at trial that the white photocopy of a unique, three-year old expired in 2005 branded title Certificate of Registration (PE-1.7, page 3), with the branded title of the trade-in vehicle fully disclosed in writing on the face thereof, was in fact found in the Respondent's deal file (a/k/a deal jacket). RP-149, lines 1-19. Furthermore, Mr. Alvarez gave unrebutted testimony that he provided copies of both of those registrations to the Respondent on Tuesday May 13th, 2008, three full days before the sale. RP-293, line 10 to RP-294, line 2; RP-243, line 11 to RP-245, line 23.

Respondents Alvarez also confirmed at trial, as they already had done before trial likewise without any contradiction or challenge from the Respondent whatsoever other than Respondent's own failure to notice and/or

complete lack of memory (See again CP-47, line 21 to CP-52, line 24; and CP-294-295), that the deal, as far as the Respondent accepting the trade-in vehicle as shown, and as displayed on the door pillar, and as disclosed in writing on the written vehicle registration copies provided (at PE-1.7, page 3 and DE-10])[1], was reached on May 14th, 2008 (two days before the actual written sales contract PE-1.1).

This occurred when the salesman Mr. Harris called and said "It looks good, I think we got a deal. The only thing I might not be able to do is get you your price, your monthly payment [on the financing for paying the lender dependent amount of principal and interest needed for funding the already agreed upon deal only]." RP-247, lines 4-17. Mr. Alvarez then testified that "I told him [Mr. Harris] I would give him their asking price if they would give me my trade-in price for my car." RP-247, lines 13-16. Mr. Alvarez also testified that the Respondent [through salesman, Mr. Harris] nevertheless

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PE-1.7, page 3 and DE-10 were the only two copies of the registration of the trade-in vehicle admitted into evidence and Mr. Alvarez gave unrebutted testimony that he provided copies of both of those registrations to the Respondent on Tuesday May 13th, 2008, three full days before the sale. RP-293, line 10 to RP-294, line 2; RP-243, line 11 to RP-245, line 23.

represented to him (Mr. Alvarez) that the trade-in vehicle itself was acceptable to the Respondent; the Respondent had definitely accepted the trade-in vehicle (per the display of everything on the vehicle as inspected and per the written disclosures on the copies of the registrations provided). RP-248, lines 1-2.

Although only Mr. Harris is the one who physically inspected the vehicle for the Respondent and who took copies of the registration, and Mr. Prunier didn't do the vehicle inspection, Mr. Prunier said that "every single vehicle I look at, I look for that [State Patrol Branded-Title Salvage] sticker on there [the driver's door pillar]." RP-185. When asked if there was anything else he could have checked to determine branded title status, he said "If I had been asked to I could have run a Carfax [see PE-1.8 the carfax Respondent ran albeit on 06/02/08], and we could also access the state's database [the Department of Licensing database; see PE-1.7, page 2 the DOL check that Respondent ran, albeit on 06/02/08] , run the license plate number and that would tell us too." RP-185, lines 20-25.

At trial, when Salesman Joseph Harris was asked "Did Mr. Alvarez

indicate that he had any knowledge about the history of the vehicle in the four years prior to his ownership of the vehicle?", Mr. Harris answered "**NO**." RP-198, lines 22-25 (Emphasis added). Likewise, Prunier admitted he did not know if the Alvarezes were the first, third, fourth or fifth owners of the vehicle and that Respondent had no policy in place for inquiring of customers what the basis of their knowledge of the vehicle's history was. RP-109, line16 to RP-110, line 14.

The Alvarezes in fact were the FIFTH owners of the vehicle driven by four other sets of people for over four years before the vehicle ever got to the Alvarez family. See again PE-1.8, page 4. Despite all that, the Respondent never investigated anything about the vehicle beyond what was already displayed and disclosed on the RCW 46.12.075 statutorily designated locations of the vehicle's door pillar (DE-9) and the comment section of its certificates of registrations shown and provided to the Respondent (at PE-1.7, page 3 and DE-10).

This was even though the Respondent conceded that where the customers clearly have no basis for representing much about the vehicle to

the Respondent, the Respondent had the ample and more responsible and reliable ability to check readily available public records at its fingertips which it actually did do so, albeit entirely after the fact, at both PE-1.7, page 2, and PE-1.8 which databases both simply confirmed the same information already openly displayed to and for the Respondent on the driver's door pillar (DE-9) and also already disclosed in writing on the copies of the registration (PE-1.7, page 3 and DE-10) all of which disclosures were all provided entirely before the Respondent gave its acceptance of the trade-in vehicle and told Prunier to write up the deal and get the customers in for the final signatures.

Respondent's CFO, Ms. Wigmosta testified that the Respondent allegedly had an established company policy against doing any retail sales of branded title vehicles as opposed to sending them to wholesale [arguably implying that the Respondent had a policy of having its employees identify and reject any and all proposed trade-in vehicles which have branded-titles]. RP-136, lines 8-11.

Despite the alleged policy, the finance manager Jim Prunier didn't perform a physical inspection of the vehicle and the Salesman Mr. Harris who

did perform that inspection, simply failed to notice the State Patrol sticker prominently and openly displayed right in plain view on the RCW 46.12.075 statutorily designated location of the driver's door pillar during his entire inspection consisting mostly of him standing at the driver's open door and looking all over at the vehicle and all its features and conditions for nearly half an hour. RP-245, lines 1-5.

As for the registrations copied by Mr. Harris into the deal file during the pre-sale inspection (PE-1.7, page 3 and DE-10), All Ms. Wigmosta could do was merely state in the final analysis that ". . . **I DON'T THINK THE SALES DEPARTMENT LOOKS AT THE REGISTRATION VERY CAREFUL."** (RP-154, lines 12-17)(Emphasis added). Judge Lawrence-Berrey couldn't agree more based on all that uncontroverted evidence and easily concluded that the Respondent had been "grossly inept" at CP-517, para. 2. That accurate summation was also supported in the record by both Mr. Harris and Mr. Prunier. Mr. Harris testified as follows:

> Q: Okay what training have you been given, if any, with regard to registrations and what they're about regarding a car?
>
> A: Registrations are supposed to be signed. This one's

[Harris Dep. Exhibit #3/DE-10] not signed. But beyond that - that the VIN number matches with the vehicle. I have no training on registrations because that is not my area of expertise. I don't handle you know, scrutinizing the registration. I just take the registration [a copy of it, from the customer and put it in the deal file and pass it on]. I'm just the messenger.

Q: And you put it in the deal jacket [deal folder]?

A: Yes.

Q: And the deal jacket goes to who?

A: The sales manager and James Prunier, or anybody that needs to deal with it.

Q: And who – I'm sorry, who would you say needs to deal with it?

A: Jimmy or Ben. James Prunier or Ben Esquivel.

RP-218, lines 8-24.

However, Benjamin Esquivel, the sales manager never testified at all about why he did nothing about the branded title registration disclosure in

that deal file and James Prunier admitted he **SIMPLY DIDN'T REMEMBER** seeing any registration certificate of the Alvarez trade-in vehicle, although Prunier absolutely did not claim that Mr. Alvarez did not provide a copy of that registration to Mr. Harris or that a copy of that registration was not placed in the deal file he was working with to finalize the sale. RP-99, line 23 to RP-100, line 24.

Mr. Prunier, testifying as an ex employee without reviewing the file to refresh his memory, made clear that he did not know one way or the other whether the registration with the branded title disclosure had been gathered from Mr. Alvarez and put into the deal file. He merely explained that "The sales desk [Harris and Benjamin Esquivil] usually got that stuff and they load the deal - everything goes to the sales desk, they load the deal up [putting all the vehicle information from the registration into the computer] and give it to me and I just do the [final] paperwork [for everyone to sign] after that." RP-101, lines 1-4; RP-102, lines 7-21. Prunier further stated, "The deal's [information's] loaded [into the computer] before I get to it. **SOMETIMES I WOULDN'T EVEN LOOK AT A REGISTRATION** because the sales manager would [have already] had it and loaded it into the computer." RP-

103, lines 17-20(Emphasis Added).

Next, both the Appellant customers, Mr. and Mrs. Alvarez, each gave unrebutted testimony about the fact that all the sales paperwork (PE-1.1 - the vehicle purchase contract listing the accepted trade-in, and PE-1.2 - the retail installment sales agreement to finance the deal) had already been signed, keys exchanged, and they had already gotten up to leave, a full 20 minutes before Jim Prunier ever presented them with PE-1.3 entirely after the fact. RP- 242, line 22 to RP-245, line 25; RP-255, line1 to RP-256, line 23; RP-258; and RP-351, line2 to RP-355, line18.

Mr. Prunier agreed that what Mr. and Mrs. Alverez had said about how it all transpired was exactly how it could have happened, especially if he couldn't find a PE-1.3 document, and he could not refute the Alvarez's joint testimony nor could he state at all that PE-1.3 had ever came BEFORE the Respondent Dealership had already accepted the vehicle. Again, to repeat and emphasize, the Respondent presented absolutely no testimony or evidence that PE-1.3 was ever presented, signed, or relied upon at any time PRIOR to having already given final and unconditional acceptance of the

trade-in vehicle by having already signed final and binding paperwork for doing so (PE-1.1 and PE-1.2).

Worse yet, Mr. Prunier admitted that PE-1.3 was just used a "last resort" to "cover his _ss", even after the Respondent has already inspected the vehicle itself to determine if it's got a branded title or otherwise has some other damage to it. RP-131, lines 3-8. However, Mr. Prunier did not explain why Respondent would use PE-1.3 after already accepting the trade-in vehicle and already signing a final and binding deal for it.

The sole evidence was that the Respondent's final and binding acceptance of the trade-in vehicle had already been given via PE-1.1 and PE-1.2, a full twenty (20) minutes earlier, if not days earlier, all without any reliance on PE-1.3 whatsoever. Arguably, that final and binding acceptance had already been given based on the three days earlier (May 13th, 2008), prior and ample and repeated and written disclosures of branded title status, whereupon the Respondent then consummated its acceptance by executing and signing final and binding documents thereon, without any contingencies or any right to back out thereon at least a full 20 minutes before PE-1.3 even

existed.

Therefore, it is uncontested and beyond argument that Respondent HAD ALREADY GIVEN ITS FINAL AND UNCONDITIONAL ACCEPTANCE OF THAT TRADE-IN VEHICLE A FULL 20 MINUTES BEFORE PE-1.3[2], NOT AFTER AND DEFINITELY NOT IN RELIANCE THEREON. This finding and conclusion is amply based in the record and in fact is completely uncontested. Therefore, the vehicle was already fully accepted, as-is, as displayed, as documented, and exactly as disclosed in the pre-sale inspection and document provision days earlier, and contractually and unconditionally finalized a full 20 minutes before PE-1.3, and not based

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See CP-513-514 wherein Judge Lawrence-Berrey expressly made a finding of fact that ". . . Mr. and Mrs. Alvarez signed the papers [needed to complete the entire transaction]. Keys were exchanged. As Mr. and Mrs. Alvarez were walking out, Prunier told them to wait, that there was one more paper to sign [which turned out to be PE-1.3]. Mr. and Mrs. Alvarez waited another twenty minutes. [It was only after all those things had already occurred and all that time had passed, that] Prunier handed them a document [PE-1.3] entitled, 'Seller's Disclosure'. Mr. and Mrs. Alvarez (the buyers) signed the Seller's Disclosure without reading it or having it explained to them. They then left in their SRX."

at all on PE-1.3.

B. Next, Respondent's brief states: "This case began as a simple breach of contract [breach of PE-1.3]". RB, page 1, introduction. That is inaccurate. This case has nothing to do with PE-1.3 or any breach thereof. Actually, this case ONLY began when Respondent tried to illegally renegotiate the trade-in value with a customer, despite the customers' three prior, undisputed pre-sale disclosures to the dealer still sitting in the car dealer's possession, all in direct violation of RCW 46.70.180(4)(b) and in violation of an ongoing injunction (at CP-589-596; CP-1031-1032; Banuelos v. TSA Washington, Inc. (Hertz Car Sales) 134 Wash. App. 603, 141 P.3d 652 (2006)) and thus also in violation of RCW 46.70.140, and the customers refused to accede to that violation.

Interestingly enough, the Alvarezes had also offered the dealer the overly generous out of rescission[3] even though the entire mess was solely

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See CP-515, wherein Judge Lawrence-Berrey expressly found that "During all relevant times, Alvarez was willing and able to rescind (exchange the SRX for the Avalanche) and pay Hertz $9,380." See Also CP-65, lines 16-23

attributable to the "gross ineptness" of the dealer itself. Thereafter, the case was all just about how the Alvarezes properly resisted the Respondent's illegal demands which the Respondent attempted to pursue through and by using the Court system to force their illegal action through the power of the State. That's the real and only reason this case began. PE-1.3 isn't even part of that equation and never was. That irrelevant allegation is just a red-herring attempted distraction.

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of the uncontested sworn Declaration of Samuel Alvarez wherein Alvarez submitted an unrebutted sworn declaration that on June 4th, 2008, the minute that Hertz had first informed him that Hertz didn't like the trade-in vehicle which Hertz had accepted back on March 16th, 2008, Alvarez stated "So, I just said that's just fine with me, Hertz can have their lemon back and we can switch keys and cars right now. Then Mr. Esquivel said 'Oh no, not so fast, we don't want the Cadillac back; we don't buy cars back. What we need is for your to give us $9,000 of your trade-in credit back to us and take your Avalanche back with you [and let Respondent keep the full price on the SRX which was contingent on the Alvarez getting their trade-in credit].'" See also Mr. Alvarez's uncontested trial testimony again repeating and confirming the same story at RP-601, lines 11 through RP-603, line 16 (also clarifying the amount of the trade-in credit money that Hertz was demanding back from Alvarez was actually $9,380).

C. Respondent's Brief (RB) also claimed "Mr. and Mrs. Alvarez's transaction with West One [Hertz's Used Car Sales] was comprised of multiple documents . . . [including the "Seller's Disclosure Statement [PE-1.3]" RB-4, paragraph 2. This is a misleading attempt to blur the fatal after the fact timing of PE-1.3. The fact is that PE-1.3 only came into the picture a full 20 minutes after a final and unconditional acceptance of the vehicle had already been given in an already fully integrated and completely executed and finalized agreement for which PE-1.3 was NOT part of those "multiple documents", especially NOT at the critical time that final and unconditional acceptance had ALREADY been given.

D. Respondent claims: "As stated in the Seller's Disclosure Statement, West One did rely on Mr. and Mrs. Alvarez's warranty in agreeing to purchase their Avalanche as a trade-in." RB-5, paragraph 2; and "[Since] the Sellers Disclosure Statement itself informed Mr. and Mrs. Alvarez that West One would rely on the statements [therein]. . . [Therefore] West One's evidence [PE-1.3 itself] confirmed that it [West One] 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." RB-17,

paragraph 2. These statements are false and completely unsupported by any true facts in the record as already amply discussed above. PE-1.3 can say whatever boilerplate things it wants to, but it cannot un-ring the bell of all the fatal clear, cogent and convincing, true and actual evidence that already entirely refutes PE-1.3 before anyone even gets there. PE-1.3 is a POST-SALE document plain and simple and it came AFTER acceptance was already given. No matter what it says, it is still not a time machine.

E. Respondent also claimed that "Mr. Alvarez testified that he was frustrated and signed [PE-1.3] because he wanted to speed up the finalization of the transaction." RB-9, paragraph 1. This is misleading. A TRANSACTION HAD ALREADY BEEN FINALIZED. Mr. Alvarez wasn't speeding anything up but the time it would take to get out of the building. The entire transaction had already been finalized without PE-1.3, after taking many hours to do so and after full and proper disclosures and displays and documentation provided thereon to Respondent. Mr. and Mrs. Alvarez had already signed all the necessary paperwork and the deal was already binding and complete already. Neither side could back out. They had already signed everything, had exchanged keys, and were already in the

process of leaving.

F. Respondent also states: "After considering ALL EVIDENCE PRESENTED and the credibility of the witnesses, the jury found that the Alvarezes did breach their express warranty, [proximately] causing West One $3,800 in damages" RB-11, paragraph 1. This is completely unsupported by any evidence in the record. That is why this matter is on appeal. No evidence supported the jury verdicts. Here, the Respondent still cannot cite a single shred of evidence of any proximate causation between their already pre-existing damages incurred from their already accepted contract which had already been completed and accepted a full 20 minutes before PE-1.3 ever even came into existence or was thereafter breached.

As to the issue of proximate causation we need only look to Judge Lawrence Berrey's keen observation and to Respondent CFO Wigmosta's ready concession, that the Respondent's actual acceptance of the branded title was solely from Respondent's own "gross ineptness" and or because "they don't read the registration paperwork [with all the disclosures] provided to them very well", which displayed and contained and provided all the

disclosures at issue [on top of the prominent State Patrol Sticker openly displayed during Respondent's half-hour long pre-sale inspection at DE-9]. Respondents own ineptness and failure to notice what was literally placed in their face and under their nose could NEVER be attributed to any baseless claims of any non-disclosure or be because of any post-acceptance document like PE-1.3 which had nothing to do with the already freely given acceptance of the vehicle, especially since there was already a binding contract that neither party had any right to back out of.

G. Respondent also claimed: "Moreover, the court must defer to the fact finder on all issues regarding CONFLICTING TESTIMONY, witness credibility, and the persuasive value of the evidence." RB-16, para 1 (emphasis added). There is no evidence, let alone conflicted evidence, to support the verdicts and thus nothing for this Court to defer to. That is because it is undisputed that Respondent never produced any testimony to support any of its claims or defenses even though Respondent had both the burden of production and persuasion on both its breach of contract case and its affirmative defense to the RCW 46.70 violations. That is because the Respondents witnesses claimed they could not remember, thus reducing all

the Respondent dealer's claims and defenses to nothing more than baseless and pure speculation at best and dripping wet.

Instead, the best the car dealer could do was to merely have all of Respondent witnesses allege a complete lack of memory on the key facts the Respondent needed to prove and had the burden of production and persuasion on. That is for (a) the breach of contract claim asserting actual reliance prior to acceptance and thereafter some proximately caused non-pre-existing damages and (b) Respondent's affirmative defense of non-disclosure needed to justify the RCW 46.70.180(4)(b) violation. In particular, claiming a convenient lack of memory regarding the presence or absence of pre-sale disclosures which the customers Alvarez had provided completely unchallenged testimony to providing during the pre-sale inspection for Respondent's file is fatal. That convenient lack of memory was used as Respondent's sole evidence to at best merely imply nothing more than pure speculation about a possible of lack of disclosure thereon.

However, that convenient lack of memory used to somehow evade summary judgment all collapsed at trial and was entirely refuted by their own

last minute open court admission from CFO Wigmosta that the written pre-sale disclosures from the customers Alvarez which Mr. Harris and ex-employee Mr. Prunier just couldn't remember seeing in the file, were in fact actually found sitting right in their sales file from the transaction.[4]

4

This Fisons-like smoking gun, of the customer's pre-sale written disclosures of "branded title"status on the copy of a very unique old expired State of Washington certificate of registration (at PE-1.7, page 3) that had been stored in the Alvarezes' glove box, were finally conceded to have been provided by the Alvarezes to the dealer prior to the sale. However, this concession was not revealed by the Respondent to anyone until it just casually slipped out at the very end of the trial that the registrations from the Alvarezes were been found sitting in the dealer's transaction file the whole time. This of course confirmed, exactly as the Defendants Alvarez had always said, that full disclosure had been provided prior to the sale, in spite of the Respondent's dubious lack of memory claims thereon. The dealer had absolutely no other explanation for receiving those unique photocopies in their transaction file at all and their Response Brief finally conceded it at RB, page 3, paragraph 2. All the Respondent's employee witnesses were former employees and or were not shown that deal file to refresh their memories, and it was solely on that ignorant basis that they had ever said they couldn't remember seeing or obtaining such documents from the customers to put in the deal file used for the dealer's acceptance of the trade-in vehicle. All of that is precisely why now, finally, the absolute fact of the customers

That was on top of utterly failing to establish any pre-acceptance timing of PE-1.3.

H. The Respondent also asserts that "Substantial evidence supports West Once's breach of warranty claim." RB-16 "1". Not true in relevant part. This is the red-herring talking again. Respondent only proved that PE-1.3 was signed. However, the fatal problem here is that Respondent never proved that PE-1.3 was ever signed **BEFORE THE TRADE-IN VEHICLE**

Alvarez's pre-sale branded title disclosures is, as it must be, readily conceded as having been provided by the customers Alvarez prior to the Dealer's acceptance of the trade in, as finally seen in Respondent's Reply Brief at page 3, paragraph 2 wherein they are finally forced to admit that during the negotiation phase of the transaction, "West One's sales person, Joseph Harris, spent approximately 30 minutes inspecting the Alvarezes' Avalanche [with the salvage sticker in plain view on the driver's door pillar] AND MADE COPIES OF THE REGISTRATION DOCUMENTS IN ITS GLOVE COMPARTMENT." (Emphasis added). Both of those registrations (PE-1.7, page 3 and DE-10) have the branded title disclosures right on them right in the RCW 46.12.075 statutorily designated comment section for doing so. Of course, as the customers Alvarez have been trying to tell everyone all along, that is FATAL to all of Respondent's claims and defenses, and is dispositive of this entire case as it has been since day one, not withstanding the purported lack of memory somehow used to force the case to trial.

HAD ALREADY BEEN ACCEPTED by the dealer or that it was ever relied upon prior to acceptance or reasonably relied upon. This is especially considering all the prior and uncontested disclosures showing that PE-1.3 was clearly false and unreliable (as if it were ever reasonably reliable to rely on a fifth owner lay person that doesn't posses the title or know what a branded title is or how to look for it or what all the four other prior owners did with the vehicle for four entire years either).

The reason Respondent didn't prove any reliance, reasonable or otherwise, or any proximate causation either, is because they had absolutely no evidence to do so, due to a complete and utter lack of memory, also undercut by the smoking gun documents being found sitting in their own file the whole time. Worse yet, all those fatal and damning facts simply reveal that PE-1.3 had no true purpose, which then leaves the only remaining conclusion that it was actually used for nothing else but as a trojan horse cover in order to commit an illegal, statutorily RCW 46.70.180(4)(b) barred and an RCW 46.70.140 injunction barred act.

The brick wall of reality in this case is that this Respondent still has

absolutely no facts to establish any pre-acceptance reliance on any other basis than the 3 (three) pre-sale disclosures made prior to the dealer's acceptance of the trade-in vehicle. Nor can the Respondent dealer show any PROXIMATE CAUSATION of any damages, let alone their ALREADY PRE-EXISTING DAMAGES situation from their PRIOR ACCEPTANCE on the earlier contract that had already been incurred before PE-1.3 ever even came up.

To be sure, a breach of contract is only established if ALL of the following elements are shown, not just the first three: (1) there is a valid agreement, oral or written which ever actually formed, (2) which imposes a duty, (3) that the duty was breached, and **(4) THE BREACH OF THAT DUTY IS WHAT PROXIMATELY CAUSED DAMAGES THAT RESULTED AFTER THAT BREACH TO A CLAIMANT**. Northwest Manufacturers v. Dept. of Labor, 78 Wash. App. 707, 712, 899 P.2d 6 (1995)(further citations omitted)(Emphasis Added).

As they say, TIMING is everything. Ready, fire, aim, simply does not hit the target. Providing a final and binding, as-is, and as-represented and as-

displayed, and as-disclosed ACCEPTANCE, and thereby incurring the completely self-inflicted acceptance of a fully disclosed and voluntary, BRANDED-TITLE BARGAIN thereon, and thereafter setting up an after the fact contract document (PE-1.3) twenty minutes later, and then asserting at the signing thereof an immediate breach, and then claiming the same already pre-existing damages thereon, does not cut it either. Respondent had already accepted the vehicle in a final and binding deal 20 minutes earlier which neither party had any right to back out of, and had given final and binding acceptance of the trade-in vehicle, as is, as displayed, and as described in all the paperwork provided, and absolutely without any reliance on PE-1.3 at all.

If Respondent is claiming they were damaged because the vehicle had a branded title, then those pre-existing damages had already occurred a full twenty minutes before PE-1.3 was ever signed and without any reliance thereon whatsoever. Respondent's own actions in accepting the vehicle and signing PE-1.1 and PE-1.2, after ignoring DE-9, 10, and PE-1.7, page 3, were all the sole proximate cause of any acceptance of the branded-title trade-in, end of story. Those damages, if that is what we are going to generously call them, already existed prior to PE-1.3, and had absolutely nothing to do with

any subsequent breach thereafter by the entirely innocent customers Alvarez.

Recoverable damages from a breach, only occur after there is a breach which only occurs after a contract formed, not before. Thus, the after the fact, superficial or technical "breaches" of any after the fact "duty" in PE-1.3 is not what proximately caused the Respondent's already existing "damages" i.e. - acceptance of the trade-in vehicle 20 minutes earlier and already resulting from the Respondent's signature of PE-1.1 and PE-1.2 already. It is a factual impossibility and that is fatal to Respondent's red-herring case. The trade-in vehicle, with any and all of its faults and consequences had already fully belonged to the car dealer a full 20 minutes earlier. There was no lost benefit of the bargain ever had by Respondent. To be sure, the actual law on the benefit of the bargain, is that the law of contracts only seeks to protect an injured party's reasonably expected benefit of the bargain. Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002). Again, this is yet another fatality for Respondent.

The reasonably expected benefit of the bargain for the trade-in vehicle, was receiving it, as it was displayed (DE-9), and as it was disclosed

from all the documents provided (PE-1.7, page 3, and DE-10). Therefore, Respondent had absolutely no reasonably expected benefits regarding branded title status whatsoever. There was absolutely no reasonable expectation that any after the fact concessions that were somehow and very questionably extracted from the lay consumers thereafter all without any consideration and obviously taking advantage of the lay consumers' clear and obvious ignorance could somehow magically change what the already fully and finally accepted vehicle was already shown to clearly be.

Respondent could not just ignore the obvious and what had already been disclosed and what they had already accepted and which they already could not back out from, and then somehow pull PE-1.3 out of a hat 20 minutes later and then pretend to have "reasonably relied" on any such irrelevant, post-acceptance document to allegedly claim contractual expectations at that later after the fact point in time. The Respondent should not be allowed to suddenly play "gotcha" after the fact, using pre-existing damages, and a worthless piece of paper (PE-1.3) that they had never really relied upon at any time prior to giving their already final and binding and unconditional acceptance 20 full minutes earlier on the trade-in vehicle as is,

as displayed and as already fully disclosed.

There simply was no pre-acceptance, actual reliance on PE-1.3 at all, let alone any reasonable reliance or reasonable expectations arising thereafter either. It was already a done deal 20 minutes earlier, regardless of whether the car dealer wants to claim they made a bad deal or what new after the fact papers they want signed. Absolutely no proximately caused damages resulted AFTER PE-1.3 was signed. Anything Respondent is complaining was pre-existing at that time, not proximately attributable to anything the customers Alvarez had done or failed to do, and had already happened well before PE-1.3 ever came about.

I. The Respondent claims, at RB-20 to 25, that RCW 4.84.330 applies to RCW 19.86.020 claims but yet cites no authority whatsoever for this proposition. The only claim in this case that RCW 4.84.330 applied to was the Respondent's failed breach of contract claim and for that failure, Respondent owes the Appellant all its successful defense fees both below and on appeal and on any remand until the case is over and done. Additionally, everyone knows that would be against public policy and would chill and

discourage active enforcement of the consumer statutes, RCW 46.70 and RCW 19.86. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 595, 675 P.2d 193 (1983)(The legislature intended the provisions of the Consumer Protection Act (the CPA) to encourage private parties to actively try to enforce the consumer protection laws by attempting claims brought in the public interest). See also Eagle Point Condominium Owners Association v. Coy, 102 Wash. App. 697, 712-14, 9 P.3 898 (2000).

Besides, RCW 4.84.330 only applies to contract claims where there is a contract with a fee provision which awards fees to the prevailing party "in any action on a contract or lease". RCW 46.70 and RCW 19.86 claims are not actions on a contract. Rather such statutory consumer claims are completely independent of a contract and can lie regardless of whether any contract has or has not ever formed at all. Strother v. Capitol Bankers Life, 68 Wash. App. 224, fn 59 at page 245, 842 P.2d 504 (Division I, 1992) (relying on Keyes v. Bollinger, 31 Wash. App. 286, 293, 640 P.2d 1077 (1982)(allowing Consumer Protection claim although plaintiff had waived breach of contract claim)). See also, Cornish College of the Arts v. Virginia LTD Partnership, 158 Wash. App. 203, 231-235, 242 P.3d 1 (2010).

J. The Respondent downplays why it allowed the customers Alvarez to be the prevailing party on the car dealer's rescission claim which they suddenly dropped on the first day of trial. The real reason is the car dealer did not want to draw attention or scrutiny to the fact that they had no case at all, and especially not under the required RCW 62A.2-608 analysis for rescission. Either way the Respondent's entire case was a train wreck precisely as figuratively depicted at CP-775. First of all, they weren't entitled to rescission because it was undisputed that they had rejected and therefore waived Mr. Alvarez's generous offer to rescind because the Respondent didn't want rescission in toto.[5]

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Rescission of a contract must be "in toto" and cannot be affirmed in part and repudiated in part. Lucas v. Andros, 185 Wash. 383, 55 P.2d 330 (1936). A party to a contract cannot just partially rescind an entire contract. Whatcom Builder Supply Co. V. H.D. Fowler, Inc., 1 Wash. App. 665, 463 P.2d 232 (1969). Furthermore, a car dealer cannot just renegge on the trade-in credit and try to take it back; that is an expressly banned, illegal act and a direct violation of RCW 46.70.180(4)(b), a per se unfair and deceptive act or practice under RCW 19.86.020 and a violation of the both the injunction against the Respondent and RCW 46.70.140, which is yet another per se violation of RCW 19.86.020. This is especially true where the car dealer's acceptance of the customers' trade-in vehicle at an agreed price was a

The car dealer really didn't want any rescission of the entire transaction at all. Instead, the car dealer wanted precisely what the law did not allow. The car dealer wanted to force the customers to stay locked into the full sales price that the Alvarezes had paid on the condition that they get the trade-in credit as promised in exchange, while the car dealer really just wanted to take back that entire trade-in credit from the Alvarezes. This was confirmed in writing. CP-84-85/PE-A. However, attempting to take that very action is precisely what is specifically banned by RCW 46.70.180(4)(b) and also by RCW 46.70.140 because of the injunction against any such violations. This was no innocent or justified RCW 62A.2-608 request for rescission and here is why. RCW 62A.2-608 clearly sets forth its strict requirements governing any claim for rescission after having already given acceptance as follows:

(a) on the reasonable assumption that its non-conformity

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material condition precedent to inducing the customer's agreement to purchase the dealer's vehicle for the dealer's asking price. If the dealer won't stick with the trade-in credit that was linked to the agreed price for the vehicle it sold, then there simply is no net agreed price to go forward on at all. Enforcing this all or none policy against the dealer properly avoids an injustice to the customer who would also then be stuck with two cars and two car payments.

would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance [of delivery] or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

RCW 62A.2-608.

Clearly, 608(1)(a) doesn't apply. There was no nonconformity. The dealer had already received the precisely bargained for vehicle exactly as it had already been fully disclosed and displayed from the outset. Thus, it was fully conforming. Moreover, Mr. Alvarez never promised or assured that he could or would make the branded title on the registrations or door pillar he had already disclosed to magically go away, nor could he, nor did the Respondent dealer ever ACTUALLY OR REASONABLY RELY on any such promise at any time prior to having already given final and binding

acceptance of the vehicle. As indicated in RCW 46.12.075, the title brand is permanent, and as a matter of law was placed the driver's door pillar and on each and every registration and title issued for that vehicle every single time it is ever transferred or re-registered since the date it was first branded. It would be a Class C felony for Alvarez to remove the salvage sticker from the door pillar, and it was never removed.

Section (1) (b) of RCW 62A.2-608 doesn't apply either. This is because discovery of the alleged non-conformity by the experienced Respondent merchant dealer was not difficult at all, ever, as emphasized by the Respondent itself at RP-113, lines3-25. The title brand was written all over everything, the registration paperwork (at both PE-1.7, page 3, and DE-10) and even on the vehicle itself on the designated door pillar location with the State Patrol sticker (DE-9). Additionally, Respondent not only knew they had no basis for relying on the Alvarezes for the vehicle history, all while the Respondent had fingertip access to readily available public records via its Carfax membership (PE-1.8) and the Department of Licensing public records website(PE-1.7, page 2), both of which Respondent actually used, albeit after the fact.

Nothing the Alvarezes ever did or did not do ever made the branded-title status less than shamefully easy as pie to notice or discover at any time prior to the Respondent giving is final and unconditional acceptance 20 minutes before PE-1.3. Never mind the additional fact that the Respondent is a professional merchant expert dealer with special knowledge in the industry and also it admitted it had knowledge and an actual policy regarding branded title vehicles already in place at the time in question. What this case is really about is the Respondent openly committing a blatant, misdemeanor criminal act. That is, Respondent's violation of the bushing law at RCW 46.70.180(4)(b), and the violation of a violation of RCW 46.70.140 for violating the injunction against committing any violations of RCW 46.70.180 are both, not just per se violations of the Consumer Protection Act at RCW 19.86.020 (pursuant to RCW 46.70.310), but they are also all criminal misdemeanors pursuant to RCW 46.70.170 which states:

> It is a misdemeanor for any person to violate any provision of this chapter [RCW 46.70] . . .

RCW 46.70.170.

Finally, Section (2) of RCW 62A.2-608 wasn't complied with either

because Respondent inexplicably failed to ever properly demand actual rescission WITHIN A REASONABLE TIME as required by law. It wasn't until August 21st, 2008 that Hertz even finally considered rescission, but that was not until well over 4 (FOUR) full months had already passed[6], and Defendants Alvarez had since made more car payments on the SRX Cadillac and had been forced to continue using and putting miles on it[7], all with the understanding and full reliance that Hertz had already completely rejected rescission in toto and didn't absolutely want the Cadillac back.

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6 See CP-515, paragraph 3, wherein Judge Lawrence-Berrey expressly made that finding of fact.

7 Yet, in spite of waiting four months before demanding rescission and forcing Mr. Alvarez to continue using and paying for the Cadillac that whole time after refusing Mr. Alvarez's offer for rescission to quickly and easily exchange vehicles and avoid damages, Hertz's rescission demand suddenly demanded "compensation for Mr. Alvarez' **USE OF THE VEHICLE** he purchased [the SRX Cadillac], [unspecified] lost profits, attorney's fees, and . . . [the $9,380]." See CP-515, paragraph 3, a finding of fact by Judge Lawrence-Berrey. Furthermore, by early September, 2008, less than four months after the May 16th, 2008 sale, the Alvarezes had also been forced to spend a total of $471.49 on brake repairs (DE-23; DE-24) and another $160 for a new battery (RP-609, lines 1-8).

K. The Respondent's claim that Appellant's Alvarez did not properly appeal the denial of their pre-trial summary judgment motions against Respondent is yet another irrelevant red-herring and it is even worse for the Respondent if we focus on the sufficiency of the evidence at trial than what it was before trial. The Respondent dealer and all its witnesses (Harris and Prunier) claimed absolutely no memory both before and after trial. (Harris at CP-81, line 4-25; and RP-207, line 4 to RP-209, line 5; and RP-217, line 16 to RP-218, line 25; and Prunier at CP-298, lines 15-16; and RP-99, line 23 to RP-101, line 4; and RP-102, line 4 to RP-103, line 11). The only difference between the evidence before and at trial, was at trial and ever since then the Respondent finally admitted that Harris did obtain copies of the branded-title registrations for the deal file and which Wigmosta admitted finding in the deal file that arrived from Yakima (PE-1.7, page 3, consisting of the very unique 3 year-old, expired registration of the 4th (fourth) owner of the vehicle, Ruben Guzman). RP-149, lines 1-14.

This was despite the fact that Alvarez provided unrebutted trial testimony (RP-293, lines 1-15; RP-292, lines 9-16) that like any reasonable person, he had removed everything from the vehicle and out of the glove box

of the trade-in including all the old original green registrations and all other personal property that had been stored in the glove box, taking it all for himself, just before going in to sign all the paperwork and releasing the empty trade-in vehicle to the Respondent dealer. Moreover, Wigmosta confirmed that white photo copy of the registration only came from the deal file (gathered by Harris) and NOT from any special records request for a 3 year old expired registration from the fourth owner. RP-149, lines 1-19

However, before trial, Judge Gibson and the customers Alvarez were never informed by Respondent or Respondent's counsel that the smoking gun dispositive disclosure document that the Alvarez had claimed to have given to the Respondent during the pre-sale inspection had in fact truly been sitting in the deal file the whole time, even if Harris and Prunier couldn't remember it and had no explanation for how it got their to meet Respondent's burden of proof on the breach of contract claim and the affirmative defense of non-disclosure to the RCW 46.70.180(4)(b) violation.

If we review this under CR 56 as a pretrial review, we just find that the lack of memory is just an admission of lack of knowledge making

everything the Respondent asserted on its breach of contract claim and affirmative defense of non-disclosure claim, just pure speculation. If we review it under CR 50, the same result occurs, but now its even worse because the Alvarez pre-sale disclosure was admitted at the end of the trial and openly conceded now in Respondent's Appellate Brief. Either way, the standard of review is the same and the same deficient facts make for the same inevitable legal conclusions against the Respondent on every count. The standards of De Novo review are exactly the same (as already set forth in Appellant's opening brief at pages 26-28, and the evidence before the court is not only the same lack of memory, but even worse at trial for the Respondent given the smoking-gun, Fison's admission. For the Respondent, that is merely the difference between the frying pan and the fire. Now we are in a de novo review of the final judgment and the CR 50 motion denials for which any lack of CR 56 appeal is of absolutely no help to Respondent.

II. REPLY TO RESPONDENT'S CROSS-APPEAL:

A. Judge Lawrence-Berrey's exercise of equity where justice required it, was actually explained in detail in the Court's Memorandum decision at CP-511 - 519. As Judge Lawrence-Berrey noted:

> Hertz'[s] contract invokes the remedy of rescission. Hertz requested this remedy in its complaint, but elected not to pursue it the morning of trial. However, "equity, having assumed jurisdiction over the subject matter and parties, will retain exclusive jurisdiction for all purposes." Malo v. Anderson, 62 Wn.2d 813, 384 P.2d 867 (1963).

CP-517.

> When one party uses a legal right to invoke a court's equitable power as a weapon of oppression rather than a defense of a just claim, the court may recognize circumstances that justify refusing to enforce the legal right. Holmes Harbor Water Co., Inc. v. Page, 8 Wash. App. 600, 508 P.2d 628 (1973). Common law contract remedies typically allow for rescission or damages, not rescission *and* damages. In a case where the equities are with Hertz, Hertz would be well within its rights and not overreaching by seeking remedies greater than that allowed by common law. However, as here, where Hertz'[s] gross ineptness caused its damages, and where Hertz thereafter refused to abide by its

> own contractual remedy of rescission for four months, this court will apply the rule set forth above and deny Hertz its contractual right to damages of $863.58.

CP-518-519.

Of course this case did not only just scream out for the Court's fair and reasonable exercise of equity alone, already more than fully supported by the record, the Court in essence was really just recognizing the undeniable and uncontested other side of the coin based on the uncontested evidence presented. The Court simply provided an inverse way of stating, through the reasoning of equity, the obvious facts that Hertz was clearly playing "gotcha" and was not just grossly inept in creating its own situation but had also acted unreasonably and oppressively and in bad faith thereafter, which absolutely coincided with Respondent CFO Wigmosta admission that all the Yakima Dealership people involved (Mr. Harris, Mr. Esquivel, and Mr. Prunier) didn't look very carefully at the registration (PE-1.7, page 3 with the branded title designation clearly disclosed). RP-154, lines 12-17.

The evidence in the record clearly and fully supports those

conclusions for the EQUITABLE relief given, in as much as the multiple tenable grounds for exercising equity to negate any and all alleged damages in this case include the facts that: (1) Hertz had completely failed to prove any pre-acceptance reliance on PE-1.3, (2) had already accepted the branded title trade-in vehicle a full 20 (twenty) minutes prior to the signing of PE-1.3, (3) had already received the precisely bargained for vehicle exactly as promised and represented, and as already fully disclosed, and as previously shown on the driver's door pillar which the Hertz salesman spent 30 minutes at during his pre-sale inspection, and exactly as described in the two pre-sale vehicle registrations, and (4) had already given its final and unconditional acceptance of the trade-in vehicle 20 minutes prior to PE-1.3, and (5) Hertz simply had absolutely no factual or legal basis to state that the now pre-existing receipt of an allegedly undesired branded title vehicle, which had already occurred 20 minutes prior to the signing of PE-1.3, had ever been the proximate result of result of any subsequent breach of PE-1.3. Any such claim to the contrary was obviously a factual impossibility and again ignored Hertz's own "gross ineptness" for already previously having made the very bargain it later complained about by using the after-the-fact red herring (PE-1.3).

Additionally even if the jury had decided the red-herring issue of whether PE-1.3 was breached, the Court aptly noted that the jury never really decided the issue of fault [proximate causation]" CP-517. In other words, the Court easily recognized, albeit through the view of equity being just another window to look through to see what is inside the exact same house, and seeing that Hertz had clearly attacked the Alvarezes with a red-herring weapon of oppression and had put on a baseless case founded entirely a feigned lack of memory to waft nothing but pure speculation into all its claims and defense about non-disclosure before having given its already final and unconditional acceptance 20 minutes before PE-1.3 and all while holding the smoking-gun, Fisons, pre-sale disclosures in their deal file the whole time without telling anyone till the last minute at trial.

Obviously, Hertz did all that just so it could improperly survive summary judgment by Judge Gibson and get to a trial in front of the jury and Judge Lawrence-Berrey. That was a trial which they didn't even deserve to be allowed to put on. However, they went even further and actually tried to cause a complete injustice to recover what was clearly nothing more than pre-existing damages that had already been entirely caused by Hertz's own gross

ineptness, and the fact they didn't read the branded title registrations very well, all before PE-1.3 was ever drafted, presented to anyone for signature, or ever signed. Even assuming the Respondent had ever shown actual pre-sale reliance on PE-1.3 and proximate causation, the sole damages were clearly and properly viewed as nominal and the law does not care for trifles. That is the Doctrine of De Minimus Non-Curat Lex where it is entirely proper for the Court to decline to award any damages to the Respondent, pursuant to the reasoning of Reynolds v. Hancock, Jr., 53 Wn.2d 682, 684, 335 P.2d 817 (1959)(citing to McUne v. Fuqua, 45 Wn.2d 650, 277 P.2d 324 (1954).

Our state constitution vest trial courts with the power to fashion equitable remedies. Const. Art. IV, Section 6; see Kinger v. Det. of Labor & Industries, 132 Wn.2d 162, 173, 937 P.2d 565 (1997)(Even the legislature's Industrial Insurance Act does not alter the constitutional equity power of Washington's courts). Furthermore, the power of equity has been construed to be as broad as equity and justice require. Agronic Corp. Of America v. deBough, 21 Wash. App. 459, 463-64, 585 P.2d 821 (1978)(quoting 27 Am. Jur. 2d Equity, Section 103 (1966)). The whole idea behind the equitable powers of the court is to mitigate the harsh absolute dictates of common law

rules, and as seen with the Industrial Insurance Act statutes as well, whenever necessary to avoid an injustice.

The standard of review of a trial court's exercise of its equitable powers is not de novo review, but review for an abuse of discretion. Rabey v. Dept. of Labor & Industries, 101 Wash. App. 390, 397, 3 P.3d 217 (2000), review dismissed, (No. 70030-3 May 8, 2001). Therefore, on an abuse of discretion review, this Court reviews the record to determine whether the trial court's grant of equitable relief is based upon any tenable grounds or tenable reasons. Pederson's Fryer Farms, Inc. v. Transacmerica Ins. Co., 83 Wash. App. 432, 454, 922 P.2d 126 (1996). That record on review, more than justifies the proper finding of Judge Lawrence-Berrey that the Respondent deserved nothing, no matter what the jury had erroneously found, which record is amply explained above in this brief.

This Court will further note that Alvarez had offered rescission in toto, but the Respondent refused and insisted on demanding back under threat of this lawsuit, all of the trade-in credit, an action expressly banned by RCW 46.70.180(4)(b) and the injunction. Respondent claims this was just taking

"reasonable actions to mitigate by way of a mere rescission of just the trade-in transaction". Respondent urges this Court to believe it was just an innocent mitigating party employing mere "negotiations to rescind" (Respondent's Brief (RB), page 6, line 6), and should be allowed "wide latitude" with regard to actions it takes to act reasonably to mitigate non-pre-existing damages inflicted after PE-1.3 was signed and then breached. RB-25 (citing to TransAlta Centralia Generation, LLC v. Sickesteel Cranes, Inc., 134 Wash. App. 819, 825-6, 142 P.2d 209 (2006)). However, Respondent cannot cite a single case where such "wide latitude" included allowing 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, RCW 19.86.020 and in direct violation of an active injunction.

III. ATTORNEY'S FEES

Appellant re-alleges and incorporates the same arguments for fees as before under RCW 46.70.190, RCW 19.86.020 (for Appellant's statutory consumer claims), and pursuant to RCW 4.84.330 (on the Respondent's breach of contract claim), as already set forth in the Appellant's opening brief at pages 48-50.

IV. CONCLUSION

The Alvarezes' CR 56 and CR 50 motions should have been granted because Respondent had no facts to support either the Respondent's contract claim or its affirmative defense of non-disclosure on the Alvarez's counterclaims. As such, the Alvarezes should have been awarded all their reasonable fees and costs under RCW 4.84.330 (on Respondent's contract claim) and under RCW 46.70.190 and RCW 19.86.090 (on Defendants counterclaims). To be sure, even if the CPA counterclaims failed, Respondent had absolutely no right to ever recover or offset any legal fees, even if successful in defending the claim, due to the express, one-way, consumer-only, fee-shifting provisions of RCW 46.70.190 and RCW 19.86.090.

Respectfully submitted this 26th day of October, 2013.

David Trujillo

DAVID B. TRUJILLO, WSBA #25580,

Attorney for Appellants Alvarez