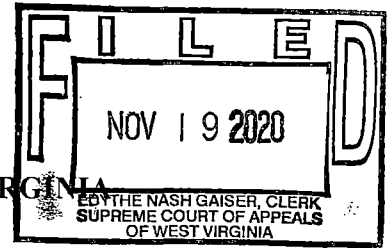


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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**CHARLESTON, WV**

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**CARESSA DELANEY,**

**Plaintiff/Respondent**

**v.**

**Underlying Civil Action No. 18-C-75  
(Circuit Court of Monongalia County)**

**DAN'S CAR WORLD, LLC a West Virginia  
Limited Liability Company dba DAN CAVA'S  
TOYOTA WORLD,**

**Defendant/Petitioner**

**BRIEF OF THE RESPONDENT  
&  
RESPONDENT'S REQUEST  
FOR ATTORNEY FEES AND COSTS OF APPEAL**

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## **I. STATEMENT OF THE CASE**

### **A. PROCEDURAL POSTURE**

Thanks to the multiple and repeated discovery abuses by Dan's Car World, LLC (hereinafter "Car World") over a nearly two-year period, the procedural history in this matter reads like a convoluted legal horror novel. *In fact, as discussed below, Car World's intransigence and disregard for rules of procedure continues through this appeal as it not only filed its rule 7(e) list 9 days late, but then totally ignored Ms. Delaney's request to supplement the list.*<sup>1</sup>

This is a breach of warranty, deceptive act, and fraud case arising from the purchase of a used automobile that had multiple and repeated defects and accompanying repairs as discussed below. Appellee Caressa Delaney (hereinafter "Ms. Delaney") filed her Complaint against car dealer, Appellant, Car World in the Circuit Court of Monongalia County on February 20, 2018. A. 1-9. Ms. Delaney asserted causes of action for her purchase of a used 2012 Chevrolet Equinox, including breach of express warranty, breach of implied warranty, misrepresentation and fraud, breach of the Magnuson-Moss Warranty Act, and revocation of acceptance. A. 1-9.<sup>2</sup> Ms. Delaney served her First Set of Interrogatories and Request for Production of Documents on Car World on March 22, 2018. A. 30-48. Car World did not file responses.

After attempts to resolve Car World's failure to comply with the discovery requests, Ms. Delaney filed her first Motion to Compel on July 11, 2018 and noticed the motion for hearing on September 12, 2018. A. 49-52 and S.A. 1337. On August 16, 2018, Car World served partial answers to the interrogatories and did not respond at all to the requests for production. A. 53-94.

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<sup>1</sup> Ms. Delaney's supplemental Appendix will be abbreviated as "S.A.".

<sup>2</sup> Car World's Appendix will be abbreviated as "A.".

Ms. Delaney again attempted to obtain full responses to her interrogatories and responses to her requests for production. Car World did not respond to Ms. Delaney's motion until a few days before the scheduled hearing when it contacted Ms. Delaney's counsel, offering to provide the requested discovery in exchange for cancelling the hearing. A. 310 (§ 3 of Motion). Ms. Delaney drafted an agreed order evidencing Car World's agreement that they would supplement the answers and respond to the requests for production by September 21, 2018. A.110-112. After receiving no response from Car World regarding the wording of the order, Ms. Delaney submitted it to the trial court who entered the order on September 21, 2018. A. 110-112 containing the order and A. 138 (ltr of 9/19/18 to Car World's counsel).

Despite Car World's agreement and the trial court's order, it failed to supplement the interrogatory answers or respond to the requests for production. Moreover, Car World did not respond to Ms. Delaney's counsels' attempts to contact its counsel and work the matter out, requiring Ms. Delaney to file her Second Motion to Compel on October 16, 2018. A 130-151. The hearing on this motion was set for January 18, 2019 and notice of the hearing date was served on Car World on October 23, 2019. A. 188 (§ 3 of Order Granting Second Motion to Compel and Motion for Sanctions). Car World did not respond to Ms. Delaney's motion. Worse, Car World failed to show up for the hearing. A. 188. When Car World did not appear, the trial court called the office of its counsel from the bench and, upon reaching counsel, permitted him to attend the hearing by phone. A. 188. Counsel for Car World admitted that he had not supplemented or responded to discovery as he had agreed and as the court ordered. A. 189 (§ 5 of Order). Counsel further advised the trial court that he would provide the previously ordered supplement and responses to Ms. Delaney that day. A. *Id.* After considering the factors set forth in Syl. Pt. 5, *State ex rel. Dodrill v. Egnor*, 198 W.Va. 409, 411, 481 S.E.2d 504, 506 (1996) the trial court ordered

Car World's counsel to pay \$1,200.00 in attorney fees to Ms. Delaney's counsel. A. 193 (¶ 8 of Order). Both at the hearing and in its February 12, 2019 order following the hearing, the trial court advised Car World that **“[a]dditional discovery failures and/or similar conduct by defendant Car World or its counsel in the future may justify harsher sanctions by this Court, including any of those listed in Rule 37(b).”** A. 192 (¶ 6 of Order). Car World served supplemental answers and a nominal response to the requests for production on January 19, 2019 by mail. A. 155-172.

These supplemental answers and responses to requests for production were inadequate. In fact, the response consisted of denials that responsive documents existed, denials that Car World was in possession of responsive documents, and statements that responsive documents had already been produced with no further information to allow Ms. Delaney to determine which documents Car World claimed to have produced. A. *Id.* Ms. Delaney attempted to address these inadequacies with Car World and to obtain dates for depositions by emails on March 19, 2019 and April 3, 2019 and by letter of May 21, 2019, which was sent by mail, email and facsimile. A. 297 (¶¶ 2-4 of Motion and Exhibits, B, C, and D to Motion). Again, Car World failed to respond to any of these communication attempts. A. 298 (¶ 5 of Motion). However, Ms. Delaney cooperated with Car World in scheduling both her deposition and that of the service manager at the Chevrolet dealership to which Ms. Delaney took the vehicle to have some of the issues repaired. These depositions took place on May 28, 2019. A. 197-201.

The parties were able to schedule mediation on July 2, 2019 but the case did not resolve. A. 298 (¶ 5 of Motion). The next time Ms. Delaney heard from Car World was after her timely disclosure of her expert witness which was followed by a letter from Car World's counsel demanding supplemental information, most of which had been provided with the expert disclosure,

and a date to depose Ms. Delaney's expert within the next two weeks. A. 213 (Plaintiff's Expert Disclosure) and A. 320-321 (Exhibit E). Ms. Delaney promptly supplemented her disclosure and provided the first available dates for the deposition of her expert. A. 223 (Plaintiff's Supplemental Expert Disclosure), and A. 298-299 (§ 6-11 and Exhibits E-J of Motion). Car World did not respond to these communications and Ms. Delaney's expert was not deposed.

In these same series of communications to Car World, Ms. Delaney repeatedly contacted counsel for Car World by email, mail, phone and fax, about scheduling depositions she wished to take and received no response. *Id.* That is, until Ms. Delaney subpoenaed Dan Cava, managing member of Car World, and Tiffany Moine, controller for Car World on September 3, 2019, after which Car World contacted Ms. Delaney to object to the date and venue for the depositions. A. 299 (§ 13 of Motion and Exhibit K). Car World also objected to the subpoena *duces tecum* to Ms. Moine for documents regarding the vehicle that Ms. Delaney had previously requested but which Car World had not produced. A. 287-289. Ms. Delaney agreed to reschedule the depositions and also responded to Car World's objection by explaining that the subpoena *duces tecum* was proper under W.Va. R. Civ. P., Rule 30(b)(1) because Ms. Moine was the custodian of the documents. A. 307-308 (§ 22 and Exhibit L to Motion). Car World did not respond to Ms. Delaney's efforts by mail and email to find a mutually agreeable date or to discuss the subpoenaed documents. A. 300 (§ 15 of Motion). On September 18, 2019, Ms. Delaney again issued subpoenas to the two deponents, this time for October 8, 2019 depositions. A. 330 (Exhibit M to Motion). Car World did not respond to the subpoenas or serve any objection regarding the subpoenaed documents until after Ms. Moine's deposition had begun. A. 287-289 (Objection by Car World) and A. 301 (§ 17 of Motion). At that time, Car World's counsel stated, **"We believe we've produced copies of all of the documents with respect to the vehicle which is the subject of this incident, and has**



previously been provided to [Ms. Delaney's counsel]." Car World's counsel also stated that he had instructed the witness not to produce the subpoenaed documents. A. 301. Not being able to resolve the matter at the deposition, Ms. Delaney again contacted Car World by letter dated October 10, 2019 in an attempt to resolve the dispute over the documents but received no response. A. 304 (§ 18 of Motion) and A. 335 (Exhibit O to Motion).

On October 25, 2019, Ms. Delaney filed her Motion for Further and Additional Sanctions and to Compel Responses to Discovery ("Motion for Further Sanctions"), describing the history of Car World's failure to cooperate in discovery, of its counsel's instruction to Car World's controller to disobey a subpoena *decus tecum* without timely objecting to the subpoena, and of Car World's failure to obey the circuit court's orders, most of which is discussed above. A. 296-359. The Motion for Further Sanctions noted that orders and monetary penalties appeared to have no effect on Car World and sought to have Car World's defenses struck, among other relief. A. 308. Ms. Delaney's counsel contacted Car World's counsel on October 25, 2019 to inquire about a November 7, 2019 hearing date for the motion, leaving a voice mail message on counsel's cell phone at 11:57 a.m. and a message at his office at 1:19 p.m. S.A. 1342. After receiving no response for five days, Ms. Delaney noticed the hearing for November 7, 2019. A. 686.. Car World did not respond to Ms. Delaney's efforts to contact him, to the Motion for Further Sanctions or to the hearing notice.

Then notably, on October 29, 2018, the parties filed their motions for summary judgment, followed by responses and replies to the summary judgment motions, motions in limine, and other pretrial documents. **Just before the November 7, 2019 hearing, Ms. Delaney realized that the exhibits to Car World's summary judgment motion included some documents that had been previously requested but not previously disclosed to Ms. Delaney.**

As a result, on November 22, 2019, Ms. Delaney served a critical document that not only included a reply to Car World's Response to the motion for further sanctions but also the ***"Plaintiff's Vouching Of The Record With Respect to Documents Recently Discovered to Exist But Not Disclosed In Discovery By The Defendant, Dan's Car World, LLC*** (hereinafter "Vouching of The Record"). A. 932-962. This Vouching of The Record noted that Car World's Motion for Summary Judgment had documents labeled "Exhibit 3, a copy of the inspection documents of February 8, 2017" (just shortly before Ms. Delaney purchased the Equinox). A. 937-954. These documents included many of the *exact* documents Ms. Delaney had been seeking throughout discovery in this case, including the documents addressed in the Moine subpoena *duces tecum* which Car World's counsel instructed Moines not to disclose. A. *Id.* For instance, one document in Exhibit 3 is entitled "Customer write-up & visual inspection" but contains no information other than the color, make, model and mileage of Ms. Delaney's vehicle even though this form has pre-printed areas to note the results of a visual inspection and walk around. A. 942. Even worse, there is a document in Exhibit 3 entitled, "Dan Cava Used Car Check Sheet." A. 949. This pre-printed form is **blank** despite having numerous items to be documented as being inspected such as the exhaust, engine/Trans Leak, and final test drive. A. *Id.*

At the outset of the November 7, 2019 hearing, the trial court advised that it was familiar with Ms. Delaney's Motion for Further Sanctions but allowed counsel to summarize. S.A. 1369-1370. Ms. Delaney's counsel then advised the trial court of the undisclosed documents attached to Car World's summary judgment motion and explained that these documents had been repeatedly requested in discovery. S.A. *Id.* The trial court noted that it had previously ordered these documents, and others, to be produced. S.A. 1373. The trial court questioned Car World on why it had not complied with discovery and with the court's orders. S.A. *Id.* Car World stated that it

had complied with discovery and supplemented according to the circuit court's February 12, 2019 order but, *upon further questioning by the trial court*, it claimed that the documents attached to its motion for summary judgment had come to its counsel's attention only recently, that previously Car World's counsel understood that the pre-sale documents Ms. Delaney had been seeking were not in Car World's possession because the work had been done by a third-party who did not keep records.<sup>3</sup> S.A. 1373-1377. *Upon further questioning by the trial court*, Car World then stated that the documents Ms. Delaney had been requesting and that were attached to Car World's motion for summary judgment were kept in a different file and that was why its counsel has not previously produced them. S.A. *Id.* Despite all of this explaining to the trial court, Car World's counsel had no excuse for first disclosing the documents as an exhibit to its summary judgment motion.

The trial court pointed out to Car World's counsel that he had "not done what he was supposed to" throughout the case. S.A. 1377-1378.<sup>4</sup>

Under questioning regarding when the documents were disclosed to Ms. Delaney, Car World represented to the trial court that they were disclosed on October 28, 2019. S.A. 1381-1382. Yet, Ms. Delaney had not received a supplemental disclosure and there is no evidence on the case docket sheet that Car World filed anything around that date S.A. 1383-1385, A. 1294. However, Car World later claimed to the court that it had discovered the documents prior to Ms. Cava's October 8, 2019 deposition and had provided the documents to Ms. Delaney's counsel at that time.

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<sup>3</sup> The involvement of this third-party in the pre-sale inspection work on the vehicle was not disclosed to Ms. Delaney until the November 7, 2019 hearing.

<sup>4</sup> At p. 3 of its Brief, Car World complains that the notice of hearing for the November 7, 2019 hearing was not provided in accordance with Rule 6. This issue was discussed at the hearing and Ms. Delaney's counsel noted that she had contacted Car World's counsel about the date 14 days out but had received no response and that Car World had not previously expressed any concern or objection about the date. S.A. 1378-1381. The trial court pointed out that, had Car World objected to the timing of the service of the notice of hearing, the court would have rescheduled the hearing and provided Car World with more time. S.A. 1380.

S.A. 1383-1383. Yet, the only documents provided at Mr. Cava's deposition were two duplicate pages of a work order showing the installation of new tires, battery, air filter, etc. S.A. *Id.* The documents attached to Car World's motion for summary judgment are more extensive, consisting of 18 pages in addition to the one work order disclosed at Mr. Cava's deposition. Although Car World stated it had provided the documents to Ms. Delaney, the evidence shows otherwise. Nonetheless the trial court ordered further mediation for that week. S.A. 1388.

During the subsequent mediation, which was held via telephone, co-defendant Huntington Bancshares, Inc. ("Huntington Bank") made it clear in an email that it would not negotiate a settlement separate from Car World -- despite an email from Car World which appeared to make such an offer -- stating that Huntington Bank had offered to contribute to a joint settlement but it had never offered "to settle out individually." A. 1244-1247. Car World's counsel was aware of Huntington Bank's position on a joint settlement prior to sending its email because he later apologized for the confusion his email had created. A. *Id.* Thus, Car World's statement at pp. 4-5 of its Brief that Ms. Delaney has foregone \$2,500.00 offered by Huntington Bank "in exchange for a release of claims" is not accurate.<sup>5</sup>

In its Brief, at p. 5, Car World suggests that the trial court's statement, "Don't apologize to me, apologize to the people who it matters to," is evidence of the trial court commenting negatively about Car World. To the contrary, the comment was made in relation to Car World not responding to Ms. Delaney's settlement demand during mediation and was not a personal attack on Car World or its counsel. A. 0972-0973. Car World's other quotes on p. 5 are similarly taken out of context in an apparent attempt to mislead this Court about the pretrial hearing. For example, the comment

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<sup>5</sup> The claim against the bank was under the "Holder Rule." Ms. Delaney dismissed Huntington Bank from the case for several reasons, including that its liability was limited and that the dismissal simplified the trial.

that Ms. Delaney's increase in her settlement demand from the July 2019 mediation was "understandable" was said in response to Ms. Delaney's explanation for the increase, pointing out the increased costs of motions and retaining an expert, as well as the trial court's own review of the extensive court file on the case. A. 0973. Finally, the comment about being "woefully insufficient and unacceptable" was in response to Car World's recitation of a settlement offer that Ms. Delaney had already rejected. A. 0976-0977. Ms. Delaney's counsel went on to explain why the offer was inadequate. A. 0977. These comments were not ad hominem attacks or expressions of opinion regarding Car World. Rather, the comments show that the trial court was incredulous with Car World's continued failure to properly engage in the case.

The trial court's, "Oh, I'm not surprised," comment that Car World complains of at p. 5 was made in response to Ms. Delaney's counsel's statement that this was the first time she had heard the settlement offer Car World made during the pretrial hearing and is understandable in the context of the protracted discovery issues and failure to obey the trial court's orders. A. 0975. The trial court reasonably followed up on this opening by inviting the parties to continue settlement negotiations. A. 0974-0976. This is the mediation that occurred during the pretrial hearing that Car World complains about at pp. 5-6 of its Brief.

Upon seeing that the case was not likely to settle, the trial court proceeded to conduct the pretrial hearing, denying both motions for summary judgment, granting Ms. Delaney's motion to strike Car World's defenses, ruling on motions *in limine* and on Ms. Delaney's Motion to Deem Requests for Admission Admitted. A. 1029-1041.

Near the close of the November 21, 2019 pretrial hearing, Ms. Delaney's counsel offered to draft the order and the trial court agreed. When asked to review the draft order pursuant to W.Va. T.C.R., Rule 24.01, Car World's only response was to state its objection to the proposed

order because it included events that occurred outside of the November 21, 2019 pretrial hearing, despite the fact that trial court's ruling of which Car World now complains is the clear result of cumulative events as described herein.

Three (3) days before the December 5, 2019 jury trial was to start, Ms. Delaney received her first notice of Car World's Writ of Prohibition filed with this Court seeking an order prohibiting the trial court from enforcing the order striking its defenses. S.A. 1300-1331. Ms. Delaney filed her Response on December 4, 2019. S.A. 1332-1363. This Court denied the Appellant's Writ of Prohibition by Order dated December 5, 2019. S.A. 1364.

Following this Court's denial of the Writ, the case proceeded to trial in front of six person Monongalia County jury on the issue of damages. Ms. Delaney presented two witnesses, herself and her expert witness, Anthony Jakicic. Car World rested its case without presenting any evidence. A. TT 199. The trial lasted an entire day and resulted in a verdict of \$18,662.09, including awarding Ms. Delaney \$2,000.00 in punitive damages. A. TT 283-286. Notably, the jury found that the violations of breach of warranty/Magnuson-Moss Warranty Act were serious enough to require a buy-back of Ms. Delaney's vehicle at the full purchase price as opposed to an award of diminished value. A. TT 284.

Once the trial was over and a Judgment Order entered, counsel for Ms. Delaney filed their Petition for Attorney's Fees and Costs while Car World filed a Motion for New Trial. A. 1063, 1133, 1198. The trial court, after reviewing the briefing and holding a hearing, granted the Petition for Attorney's Fees and Costs in the amount of 338.55 hours expended at the rate of \$375 per hour, an hourly rate to which Car World did not object -- and an additional 23.95 hours for work expended since the fee petition had been filed for a total of \$135,937.50. A. 1283-1299. Ms.

Delaney was further granted her costs expended in the litigation in the amount of \$8,621.47. A. *Id.* The trial court denied the Motion for New Trial. A. 1269-1282.

## **B. FACTS**

Just like it did in its Petition for Writ of Prohibition, Car World glosses over the history of problems with the vehicle and the merits of Ms. Delaney's underlying case, including her attempt to revoke acceptance of the vehicle. The problems with the 2012 Chevy Equinox include having the check engine light come on and complaints of engine problems just eight (8) days after purchase as well as Car World having the vehicle in its possession for repairs for 20 days within the first 6-8 weeks of Ms. Delaney's ownership.

Although Car World does reference the numerous work orders for the vehicle at issue in this matter, it is noteworthy that in the first four (4) months of ownership – Ms. Delaney purchased the vehicle on February 24, 2017 – leading up to the June 28, 2017 revocation of acceptance letter, the car was in the shop five (5) times, including repeated times for dangerous hesitation and the check engine light coming on. A. 442-444 (Plaintiff's Motion for Partial Summary Judgment). The vehicle needed thousands of dollars in repairs. A. *Id.* In fact, the recurrent hesitation and check engine light issues that appeared only eight (8) days after purchase resulted in repairs of almost \$3,000.00.<sup>6</sup> A. 442. During her trial testimony, Ms. Delaney explained to the jury what happened just days after purchase:

Q. And at some point, Ms. Delaney, did you start experiencing some problems with the Equinox?

A. I did. **It was on day seven that I noticed a really hard downshifting. I was— I actually thought someone rear-ended me, it shifted so hard.** And it sounded like metal on metal kind of noise. And the very next morning, I was taking my son to school, and the check engine light came on. It was still doing the really

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<sup>6</sup> Ms. Delaney did not have to pay out-of-pocket for the repairs because she had already paid extra for a mechanical warranty from Car World. A. 272.

hard downshifting. And I took – or I pulled over immediately. I don't know very much about cars. And I pulled over and called John Tiano, the salesman.

A. TT 110 (emphasis added). Ms. Delaney testified to all of the repair attempt on the Equinox and through her testimony the work many orders were admitted into evidence. A. TT 110. Some of the highlights of the months of frustration that she went through are as follows:

a. The repair attempt taking place eight days after purchase as noted above included replacing the catalytic convertor and actuator, repair of a leaky transmission, rear sway bars, and a timing belt. *Id.*, TT 111.

b. The next repair was only a few weeks later, around March 20, 2017 and the check engine light was on again, the Equinox still had hard shifting. The Equinox first went to Car World's garage then to Harry Green Chevrolet. Ms. Delaney did not get the car back until almost 3 weeks later. *Id.*, TT 112-113.

c. Ms. Delaney testified that many times she had to ask for time off work and find a babysitter. *Id.*, TT 114.

d. After getting her car back in April she had to take it in yet again on June 16, 2017 with problems of the car shifting hard, check engine light on, and a high revving of the engine. *Id.*, 116. She testified something was done with the camshaft and due to low oil, an oil consumption test was started. *Id.*, 116-117. She in fact testified someone at Premier Chevrolet (the repairing dealer this time) told her this model of Equinox was known for oil consumption issues. *Id.*, 117.

e. Incredibly Ms. Delaney testified she had problems only five days later (June 21, 2017) when the check engine light came on, and there was a really loud rattling/gurgling noise. *Id.*, 117-118. The oil was low and a solenoid was fixed. *Id.*

f. Ms. Delaney's problems did not end. She testified to recalling going back in a two more times for the oil consumption test. *Id.*, 119. Refreshing her memory from notes she took, Ms. Delaney testified to: July 21, the check engine light came on again and there was low oil; this happened again on August 2<sup>nd</sup> and 14<sup>th</sup> until the "big" repair attempt. *Id.*, TT 120.

g. Ms. Delaney was then shown exhibit 8, which was for the big repair attempt as she described it. *Id.*, TT 121. The Equinox was in the shop for 8 days and Ms. Delaney testified that the pistons and rings were replaced. *Id.*

Ms. Delaney then testified at trial that her issues with the Equinox continued to the present time:



Q. What other problems did you have with it?

A. I continue to have problems to this day. We – I still have transmission issues with downshifting really hard. It still misses at start-up. It has a sputter, It – a lot of times, if I am stopped at a stop light and try to take off, it won't take off, and almost to the point where it shuts off. And it's been back to the shop twice in the last six months.

A. TT 123.

These problems with the Equinox stand in stark contrast to the representations made by Car World. Ms. Delaney testified at trial that the salesperson, John Tiano, told her the vehicle was a good car, was within her budget *and had been through Car World's shop for inspection*. A. 104-105. In fact, during his deposition, salesman Tiano testified that if a car is on the lot he "thinks it's a good car." A. 446 (Plaintiff's Motion for Partial Summary Judgment). Moreover, the salesperson knew that Ms. Delaney was looking for a reliable four-wheel drive vehicle to transport herself and her young child, had a limited amount of money to spend on a vehicle, and was relying on the salesperson. *Id.*, 104. Ms. Delaney was then shown the purchase agreement for the car as exhibit 1 and the finance agreement as exhibit. *Id.*, 106-107. She authenticated the documents and they were admitted into evidence. Ms. Delaney testified that she was allowed \$4000 as a trade-in for her 2007 car and that she financed \$11,363.84. *Id.*

Ms. Delaney testified that because of defects, she was unhappy with her car very early on and communicated this to Car World salesman Tiano *a mere eight days after the purchase*. After Tiano was unable to secure her a replacement vehicle, and in compliance with West Virginia law, Ms. Delaney, by legal counsel, sent a letter by certified mail to Car World. That letter is dated June 28, 2017 and was attached to Ms. Delaney's Summary Judgment Motion as Exhibit "H". A. 536-538. That letter clearly and unequivocally spells out that Ms. Delaney was revoking acceptance of her vehicle and seeking recovery of all monetary damages, including attorney fees and, if

necessary, litigation costs. The letter also informs Car World that *the vehicle would be held until such time as she recovered all monies paid within 20 days*. The letter also reflects the various issues that she was having with the car up to that date.

Car World admitted to receiving this notice letter. A. 263. (Car Worlds Response to Admission #9). However, the first written response of any type to the June 28, 2017 notice letter was on July 25, 2017 when Car World's counsel, faxed a letter to Ms. Delaney's counsel. A. 539-540. This letter reflects Car World receiving both a July 6, 2017 settlement offer letter and the June 28, 2017 notice letter from Ms. Delaney. However, Car World's July 25 letter asserts that the notice letter contained a "defective revocation" and, in any case, **there were no express or implied warranties included with the sale of the vehicle**, an assertion that violates both state and federal law. (Emphasis added).<sup>7</sup>

The next witness to testify at trial was Ms. Delaney's expert witness, Anthony Jakicic. Mr. Jakicic is a heavy road service truck mechanic and also has a consulting and investigation business. A. 144. He testified that he has worked on cars and trucks for 43 years. A. 145-146. He has a two year associate degree in automotive technology, is certified as an instructor of automotive technology and is an ASE master certified technician. A. 146. He was qualified by the trial court as an expert automotive technician without any objection by Car World. A. 148.

Mr. Jakicic testified that he reviewed all of the work orders for Ms. Delaney's Equinox as well as sales documents and warranty documents. A. 149. He also testified that he personally inspected Ms. Delaney's Equinox and took pictures. A. 151. Mr. Jakicic testified that he saw a lot of residual oil in the engine – some from repairs and some from continued leaks. A. 152. Mr.

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<sup>7</sup> Appellee attempted to provide the trial court and now this Court with enough detail to show that no offer to cure the problem with the sale was made to Ms. Delaney as a matter of law under W. Va. Code §§ 46A-6-106(c) and (i) without getting into prohibited settlement negotiations.

Jakicic then testified that in his opinion a condition existed in the engine of the vehicle (specifically the pistons and piston rings) that caused excessive crankcase pressure to **exist prior to sale**. A. 157. He testified that this is why oil consumption tests were being done by the repairing dealers as well as the engine work. A. 157. He testified that this type of General Motors engine was plagued by this engine problem and is a design compromise in the engine. A. 158. He testified that this condition existed at the time of the sale of the Equinox to Ms. Delaney. *Id.* In fact, Mr. Jakicic noted that during his inspection he could tell, **without even reviewing any work orders**, that not only had a considerable amount of work been done to the Equinox but also due to the condition of the bolts and nuts, the amount oil residue and transmission residue that it obviously had been worked on. A. 152. He testified that the large amount of residual engine oil was not only the result of repairs but also the result of *ongoing engine leaks*. *Id.* Finally he testified that upon taking the oil filter cap off with the engine running at normal temperature there was the presence of oil vapor coming out. A. 154.

Mr. Jakicic then testified as to the various effects of these defects on the value of the Equinox and ultimately concluded that the diminished value was \$10,551.00 but that the cost to repair and rebuild the engine and other mechanical components back to a usable state would exceed the residual cost of the vehicle and thus Ms. Delaney's car is not worth much more than salvage value. A. 166.

Ms. Delaney then rested her case and Car World moved for a directed verdict. A. TT 196. The trial court denied the motion for directed verdict and Car World rested its case without calling witnesses and presenting evidence.

## II. SUMMARY OF ARGUMENT

Car World's summary judgment motion was properly denied because of the disputed material facts and the applicable law. Ms. Delaney has suffered actual out of pocket loss with the diminution in value of the vehicle to not much more than salvage value. Her revocation of acceptance was proper and effective. She was not required to return the vehicle to Car World when it declined to return the money she had paid out on it. Further, Car World violated West Virginia law in asserting that there were no express or implied warranties on the vehicle it sold Ms. Delaney.

The trial court did not abuse its discretion in this case in sanctioning Car World for its repeated failures to abide by the court's orders. Car World ignored its discovery obligations, instructed a witness to ignore a lawful subpoena *duces tecum*, ignored court ordered sanctions to pay Ms. Delaney's counsel attorney fees for having to file a second motion to compel after it ignored its agreement and the court's order regarding the first motion to compel, and ignored warnings of further sanctions. Yet, it was only after lesser sanctions failed and Car World relied on some of the very documents it had not produced in discovery and instructed a witness not to produce - despite being ordered to produce the documents - to support its summary judgment motion, that the trial court struck Car World's defenses and ordered the case proceed to trial on damages.

The trial court was correct in awarding Ms. Delaney her attorney fees and costs in this case under the fee shifting provisions of the Magnuson-Moss Warranty Act, this Court's decision in *City National Bank v. Wells*, 181 W. Va. 763, 384 S.E.2d 374 (1989), the West Virginia Consumer Credit and Protection Act, the Uniform Commercial Code, and the common law of this state. After calculating the amount of attorney fees and costs requested, the trial court determined that the

requested fee was reasonable by applying the 12 factors outlined by this Court in Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Pitriilo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Moreover, Car World did not object to the hourly fee requested by Ms. Delaney or to support its assertion that the number of hours was excessive.

Further, Ms. Delaney was properly awarded damages for fraud and misrepresentation as well as punitive damages, on which the jury was properly instructed. Moreover, Ms. Delaney is statutorily entitled to prejudgment interest.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This Appeal should be decided under Rule 19 of the Rules of Appellate Procedure Supreme Court of Appeals of West Virginia because the case involves the application of settled law under the UCC, the WVCCPA and the Magnuson-Moss Warranty Act. There is no support in the facts of this case for appellant Car World's assertion that the case treats the used vehicle at issue as a new car. Rather, the facts and argument show that the laws applied were well established principles applicable to the sale by a dealer of a used vehicle and the requirement that the dealer deal honestly with the buyer and honor its express and implied warranties under both West Virginia and federal law.

### **IV. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY DENIED CAR WORLD'S MOTION FOR SUMMARY JUDGMENT**

"It has long been established that '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Dailey v. Ayers Land Dev., LLC*, 825 S.E.2d 351, 357 (W.Va. 2019) (quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148

W.Va. 160, 133 S.E.2d 770 (1963) The trial court found that there were genuine issues of material fact in dispute and denied Car World's summary judgement motion.

Car World appears to believe that it was entitled to summary judgment because Ms. Delaney continued driving her car after revocation; the problems with Ms. Delaney's car were allegedly fixed; and any express warranties provided by the salesman were, in fact, merely "puffing." In its Brief, Car World combines these arguments under one heading and then refers to them interchangeably.

As discussed below, Car World: 1) overlooks key provisions of the Uniform Commercial Code on Revocation of Acceptance; 2) neglects the fact that fixing problems with a vehicle does not negate breach of warranty claims; 3) **glosses over the fact that in the first 4 months of ownership leading up to the revocation letter, the Equinox was in the shop 5 times – 3 involving a check engine light**; and 4) literally provides almost zero discussion regarding implied warranties, with Car World essentially arguing that there are none and that the vehicle was sold "as is" which in fact violates the West Virginia Consumer Credit and Protection Act.

**1. Ms. Delaney has Clearly Shown an Ascertainable Loss for Purposes of W.Va. §46A-6-101 et seq.**

West Virginia's version of an Unfair and Deceptive Practices Act (UDAP) is found at W.Va. Code § 46A-6-101, *et. seq.* Car World cites § 46A-6-106(b) for the proposition that a consumer must show actual out of pocket loss in order to have a UDAP violation and that Ms. Delaney has failed to do so. Car World cites no case law for its argument nor provides any type of factual basis to support the argument – simply stating that all of Ms. Delaney's car repairs were done at no cost to her due to an extended warranty that she purchased. Car World's argument is problematic for several reasons.

First of all, Car World's argument is factually incorrect. As noted in the Fact section above, Ms. Delaney's expert witness, Anthony Jakicic, testified that she suffered diminished value to her vehicle as a result of the defects that existed before her purchase and which were hidden by Car World. He testified that the diminished value was \$10,551.00 but that the cost to repair and rebuild the engine and other mechanical components back to a usable state would exceed the residual cost of the vehicle and thus Ms. Delaney's car is not worth much more than salvage value. A. TT. 166. This is clearly an ascertainable loss. In fact, a consumer is not even required to allege a specific amount of actual damages if the consumer proves that he or she has purchased an item that is different from or inferior to the one bargained for - then there is an ascertainable loss. *In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003).

Secondly, after hearing the evidence (and consistent with Mr. Jakicic's testimony) the jury specifically found that the defects to Ms. Delaney's vehicle were serious enough to warrant a buy-back of Ms. Delaney's vehicle as opposed to a lesser award of diminished value. If this is not an "out of pocket loss" in the context of a defective car case then no such loss can ever exist. *Simply put, Ms. Delaney suffered a complete loss of her purchase price.* Certainly, this is more than sufficient evidence to survive a motion for summary judgment and thus for jury consideration.

Finally, Car World argues, on pp. 30-31, that the vehicle was repaired without cost to Ms. Delaney and that the express warranty which she purchased in the form of an extended warranty was a warranty for "repair or replacement" and had nothing to do with the inherent quality of the good or future performance. This argument ignores the statements made by Car World's salesman which, as discussed in more detail below, constitutes an express warranty, but also fails to give any discussion or credence to the law of implied warranties also discussed below. In fact, Car World illegally attempted to disclaim any implied warranties for the Equinox. Car World also does

not cite any wording or language from the extended warranty in making this misguided argument or that it is even a party to this warranty – which it is not.

**2. For A Proper Revocation of Acceptance, A Consumer Does Not Have to Surrender the Goods Purchased**

In its Brief, Car World cites W.Va. Code § 46-2-608 which governs revocation of acceptance. Car World cites no other code section in support of its argument. Consequently, Car World neglects to consider subparagraph 3 of section 608 which states “*a buyer who so revokes, has the same rights and duties with regard to the goods involved as if he had rejected them.*” Car World also fails to cite and consider the code section regarding rejection. W.Va. Code § 46-2-602 provides as follows:

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (sections 2-603 and 2-604),
  - (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
  - (b) **if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (subsection (3) of section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but**
  - (c) **the buyer has no further obligations with regard to goods rightfully rejected.**
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (section 2-703). (emphasis added)



Thus, the statute is clear that there was no requirement for Ms. Delaney to simply drop off the vehicle at the dealership lot in order to effectively revoke her acceptance. In fact, doing so would have only put her at great financial and legal risk as Ms. Delaney would have then been without either the vehicle or the money she paid for it and Car World would have had both. Moreover, the revocation letter states that Ms. Delaney would hold the vehicle with due care until the time she had recovered from Car World all monies paid within 20 days. A. 536-539 (top of second page of June 28, 2017 letter). Of course, subparagraph c of 602 also notes that the *buyer has no further obligation with regard to the goods that were subject to the revocation*. Thus, there is no prohibition on Ms. Delaney continuing to drive the vehicle pending Car World refunding her all the monies she paid, which they did not do. In fact, if she had chosen to simply park the car then undoubtedly Car World would complain that she failed to mitigate her damages.

Given these considerations, it is not surprising that a number of courts have held that a plaintiff's continued use of a vehicle in an effort to mitigate damages, even after a defendant has been notified of the plaintiff's claims, is not a defense. *See generally, Henderson v. Chrysler Corp*, 477 N.W.2d 505 (1990) (holding that a buyer may resell the goods to recover damages or may continue to use the goods in order to mitigate damages); *Lorenz Supply Co v American Standard, Inc*, 300 N.W.2d 335 (1980) (the party claiming that the injured party failed to mitigate damages bears the burden of proof). Thus, Ms. Delaney's continued use of the vehicle after revocation has no legal effect on the validity of her revocation.

Car World cites the case of *Dixie Appliance Company v Bourne*, 138 W.Va. 810, 77 S.E.2d 879 (1953), at p. 29 of its Brief, for the proposition that, "a buyer of personality must reject or return all the property sold and thus place the seller in status quo as nearly as may be." However, a reading of the *Dixie* case shows facts and legal argument that have no similarity to anything

alleged in this case nor are even remotely analogous. To the contrary, the *Dixie* case involved the purchase of **20,000 feet of television cable**. *Id.*, at 811, 77 S.E.2d at 880. Knowing the seller had not provided goods that complied with the sales contract, the buyer, nonetheless, accepted delivery and used two thirds of the cable in his business before seeking to return the rest of the cable. *Id.*, at 811-812, 77 S.E.2d at 880-881. This Court found that plaintiff's failure to timely complain about the shipment not meeting its specifications and its use of two-thirds of the order constituted acceptance of the entire order. *Id.*, at 817-818, 77 S.E.2d at 883. However, the issue before the Court in *Dixie* was whether the contract of sales was one of severability, *i.e.*, whether the buyer could accept some of the goods and reject the rest. The very nature of the good sold in the present case, a vehicle, shows that the sales contract in the present case cannot be severable. Thus, *Dixie* does not support Car World's argument.

### **3. Car World Breached the Express and Implied Warranties and the Magnuson-Moss Warranty Act**

The representations Car World's salesman made that the Equinox was a good car or else it wouldn't be on the lot and that it had been inspected by the service department are not simply sales "puffing" as Car World argues. Rather, these statements constitute an express warranty Ms. Delaney relied on during the purchase process. Car World cites the Uniform Commercial Code at W.Va. Code § 46-2-313(2), which provides:

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty

Yet, Comment #8 addresses this section by noting, "Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What

statements of the seller have in the circumstances and in the objective judgment become part of the basis of the bargain?” If a statement that a car is a good car and has been inspected is mere sales talk then virtually nothing a salesman says can be taken for more than a grain of salt. Ms. Delaney would strongly urge this Court to reject such an outcome. Courts have held that a statement that a vehicle is “in good working condition,” or in “A-1 condition” to be affirmations of fact and express warranties. *See generally Cagney v. Cohn*, 13 U.C.C. Rep. Serv. 998 (D.C. Super. Ct. 1973) (holding that a statement that a motorcycle was in good condition and did not need major repairs is an express warranty); *Morehouse v. Behlmann Pontiac-GMC Truck Serv., Inc.*, 31 S.W.3d 55 (Mo. Ct. App. 2000) (van was in “excellent condition,” “tip-top shape”).

Car World gives no discussion to the law of implied warranties, which in West Virginia cannot be waived or modified if the subject of a consumer transaction. W.Va. Code § 46A-6-107. The implied warranty of merchantability for instance requires a product to be reasonably fit for the purposes it is used and to otherwise be acceptable in the trade of that product. W.Va. Code § 46-2-314. Ms. Delaney’s experiences starting very shortly after purchasing the Equinox, not to mention Ms. Delaney’s expert’s report, clearly show otherwise. A. 531-535.

As Ms. Delaney’s expert, Anthony Jakicic found after inspecting the vehicle and reviewing the records, the conditions that caused the problems with Ms. Delaney’s vehicle existed at the time of purchase “and is readily diagnosed both visually in external oil leaks and staining of the exhaust joints, as well as normal evaluation of a used vehicle during a pre-sale inspection.” A. 534. Since there was more than sufficient evidence that Car World violated express and implied warranties under West Virginia law, it has also violated the federal Magnuson-Moss Act. 15 U.S.C § 2301 et.seq. This act provides remedies for a consumer who has suffered damages by a supplier’s failure to comply with written or implied warranties. 15 U.S.C. § 2310(d)(1).

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING CAR WORLD'S ANSWER AND DEFENSES GIVEN CAR WORLD'S FAILURE TO OBEY COURT ORDERS AND ITS DOCUMENTED DISCOVERY ABUSES**

The sanctions issued by the trial court for appellant Car World's repeated failure to obey its orders regarding discovery as well as other discovery misconduct are well within the trial court's discretion. Such orders "will not be disturbed upon appeal unless there has been an abuse of that discretion." *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 171, 332 S.E.2d 127, 132 (1985), *cert. denied*, 474 U.S. 936 (1985) (citations omitted).

In determining whether a sanction is appropriate, this Court has established a two (2) part test. First, the trial court must have clearly explained why the sanction was appropriate. *Smith v. Gebhardt*, 240 W.Va. 426, 430, 813 S.E.2d 79, 83 (2018)(quoting *State ex rel. Richmond Am. Homes of W.Va. v. Sanders*, 226 W.Va. 103, 113, 697 S.E.2d 139, 149 (2010)). Then, this Court

must determine whether the sanction actually imposed fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing.

*Id.*, 430-31, 813 S.E.2d at 83-84. The sanction in the present case more than meets this test.

The trial court's orders demonstrate the extent of Car World's discovery misconduct, the prejudice to Ms. Delaney, and the trial court's efforts to obtain compliance, despite repeated misconduct, prior to striking the pleadings as a sanction. These include the following.

- Car World's failure to respond to initial discovery requests, necessitating the first motion to compel that was granted by a September 21, 2019 Order to which the parties agreed. A. 188-189 (Order Granting Second Motion to Compel); 1030 (Order regarding 11/21/19 Pretrial Hearing). This failure required Ms. Delaney to file a second motion to compel.
- Car World's failure to appear at the January 18, 2019 hearing on the second motion to compel resulting in the trial court contacting Car World by phone from the bench so that the hearing could proceed. A. 189; 1030.

- Car World's admitted failure during the January 18, 2019 hearing to abide by the September 21, 2018 Order to produce discovery or to communicate with Ms. Delaney's counsel. A. 189; 1030. At that hearing, the trial court sanctioned Car World with \$1,200 in attorney fees and warned Car World, "Additional discovery failure and/or similar conduct by defendant Car World or its counsel in the future may justify harsher sanctions by this Court, including any of those listed in Rule 37(b)." A. 190-193; 1030.
- Car World's continued failure to supplement discovery or to pay the sanction as ordered and to communicate with Ms. Delaney's counsel, despite counsel's numerous attempts via phone, mail, fax and email. A. 1031-1032.
- Car World's failure to cooperate in scheduling depositions and its instructions to a witness-employee to ignore a subpoena *duces tecum* for the vehicle inspection documents. These are documents Ms. Delaney had been seeking and the court had ordered be produced. Car World's instruction to the witness-employee was given without it stating an objection to the subpoena until after the deposition had begun. This necessitated the filing of the Motion for Further Sanctions, *et cetera*, on October 24, 2019. A. 1031-1033.
- Car World's failure to timely cooperate in the mediation that was ordered by the trial court in lieu of ruling on sanctions at the November 7, 2019 hearing. A. 1039.
- Car World's attachment to its summary judgment motion of the inspection documents it had refused to produce for a year and its inability to explain to the trial court the reason for its failure to produce these documents despite the court's orders. A. 1034-1036. The failure of Car World to produce these documents during discovery prejudiced Ms. Delaney's ability to prosecute her case by hiding the facts regarding Car World's pre-sale inspection of the vehicle, a material issue in this case.

Particularly in its December 4, 2019 Order regarding the sanction of striking of defenses , the trial court detailed the above misconduct by Car World and Car World's repeated failure to obey the court's orders. A. 1029-1041. The Order contains almost seven (7) pages of findings of fact explaining Car World's discovery transgressions that lasted over the course of nearly two years as well as the fact that lesser sanctions had no effect on Car World's behavior. For example, at paragraph 10, the trial court stated:

Given the Defendant's pattern of discovery misconduct, forcing of the Plaintiff to expend time and money responding to the Defendants misconduct, ignoring of prior court orders and lack of effect of monetary sanctions on the Defendant, the Court is of the opinion that only harsher sanctions will serve the interest of justice in this matter and accordingly ORDERS that all defenses asserted by the Defendant to the

Plaintiff's complaint are hereby stricken and that this matter shall proceed to trial on December 5, 2019 on the issue of damages only.

A. 1040 (Order, December 4, 2019, ¶ 12). The Order is also replete with findings of prejudice to Ms. Delaney, finding, for example at paragraphs 4 and 5 of the its Conclusions of Law that Ms. Delaney had to file repeated motions concerning Car World's failure to provide the inspection documents in discovery only to have some of these very documents end up as exhibits to Car World's motion for summary judgment. Consequently, the trial court held in its Conclusions of Law:

As noted by the Plaintiff in her reply to the Defendant's late Response to Plaintiff's Motion for Further Sanctions, etc., the Defendant as of the November 21st pretrial, still has not paid the earlier attorney fee sanctions of \$1200 and has issued no proper discovery supplement even for those very documents Defendant included in Exhibit 3 of its Motion for Summary Judgment but never disclosed as noted above. Additionally, as further noted by the Plaintiff in its Reply, the Plaintiff has been denied the ability of further inquiry or explanation for the various non-disclosed documents including questioning previously deposed witnesses or determining which witnesses need subpoenaed to trial etc.

A.1039-1040 (*Id.*, 11-12). The bases for the trial court's decision to strike Car World's answer and defenses is well supported in the record.

Despite its assertions otherwise, at pp. 33-34, the trial court did not prevent Car World from defending itself regarding punitive damages. The court's ruling struck Car World's answer and defenses regarding liability and the case proceeded to trial on the issue of **damages**. Nothing in this ruling inhibited Car World from introducing evidence to defend itself from the damages claimed. Car World chose not to call any witnesses or to otherwise put on evidence to address its actions, other than to cross-examine Ms. Delaney.

Further, the question of whether to award punitive damages was left to the jury. The trial court's instruction to the jury on punitive damages made it clear that the jury was not required to award punitive damages.

I will now explain the law of punitive damages. Although I am explaining the law of punitive damages, it does not mean that I have an opinion on whether punitive damages should be awarded. That decision is yours alone. You are not required to award punitive damages.

A. TT 223-224. Further, the Verdict Form asked the jury whether it found by clear and convincing evidence that Car World acted with actual malice “or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.” A. 1052. The jury answered “Yes” and awarded Ms. Delaney \$2,000 in punitive damages.<sup>8</sup> Thus, Car World’s constitutional rights were protected. No ruling directing the jury to award punitive damages was issued, no ruling prohibited or interfered with Car World’s ability to present evidence to defend itself from a verdict regarding punitive damages. It should not now be heard to complain about the results of its choices.

**C. THE TRIAL COURT PROPERLY AWARDED APPELLEE HER ATTORNEY FEES AND COSTS**

Appellee Ms. Delaney was entitled to an award of attorney fees and costs for her claims under both the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, specifically § 2310(d)(2) (allowing prevailing consumer to recover attorney fees and costs), and this Court’s decision in *City Nat’l Bank v. Wells*, 181 W.Va. 763, 777, 384 S.E.2d 374, 388 (1989) (holding that a consumer who prevails on a claim for revocation of acceptance and cancellation of a contract of sale in an action for breach of the seller’s warranties under the UCC may recover reasonable attorney fees and costs under the Magnuson-Moss Warranty Act). These attorney fees and costs are also recoverable under W.Va. § 46A-5-104 (authorizing an award of “all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer” in any claim brought under the WVCCPA), under the Uniform Commercial Code (“UCC”), W.Va. Code § 46-2-101, *et seq.*, and under the common law.

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<sup>8</sup> Car World has not assigned error regarding either the jury instructions or the Verdict Form.

This Court has held that a prevailing plaintiff in a case for revocation of acceptance for the breach of express and implied warranties, such as in the present case, should be awarded “a sum equal to the aggregate amount of cost and expenses (*including attorneys’ fees based on actual time expended*) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, *unless the court in its discretion shall determine that such an award of attorneys’ fees would be inappropriate.*” *City National* (quoting *Muzelak v. King Chevrolet*, 179 W.Va. 340, 347, 368 S.E.2d 710, 717 (1988); 15 U.S.C. § 2310(d)(2)) (emphasis in original). In *City National*, the plaintiff purchased a truck that quickly began having engine problems and spewed heavy smoke. 181 W.Va. at 767, 384 S.E.2d at 378. The plaintiff returned the truck to the seller several times to have this issue repaired and also took it to another dealership, but the smoke emissions were not repaired after nine months. The plaintiff notified the bank that held the loan on the truck that he intended to cease payments and purchase another vehicle. *Id.* When the bank reposed the vehicle and filed suit against the plaintiff to recover its losses, the plaintiff filed a third-party complaint against the seller and manufacturer to revoke acceptance and cancel the sales contract for breach of express and implied warranties under the UCC and the Magnuson-Moss Act. *Id.* at 767-768, 384 S.E.2d at 378-379. The jury returned a verdict in favor of the plaintiff but the trial court declined to award the plaintiff his attorney fees and costs. *Id.* at 768, 384 S.E.2d at 379.

On appeal, this Court found that attorney fees and costs were available in cases involving a revocation of acceptance and cancellation of the sales contract for breach of UCC warranties. *Id.* at 777, 384 S.E.2d at 388. The case was remanded “with directions to award the plaintiff reasonable attorney fees under the Magnuson-Moss Act.” Similarly, in the present case, Ms. Delaney purchased the vehicle from Car World and within eight (8) days began experiencing



problems with the vehicle, including the check engine light coming on, the engine missing, the transmission dangerously hesitating. Ms. Delaney returned the vehicle to Car World on several occasions and also took it to another dealership for repairs, but the vehicle is still not fully repaired. Ms. Delaney lawfully revoked her acceptance of the vehicle and canceled the contract of sale because of Car World's breach of express and implied warranties, including warranties protected by the UCC and the Magnuson-Moss Act. After prevailing at trial, the trial court awarded Ms. Delaney her reasonable attorney fees and costs. There is no reason why this award should be overturned.

As the trial court found:

This case is precisely the type of case for which fee shifting provisions were designed. As the Supreme Court of Appeals has noted, statutory fee shifting provisions "are a response to legislative recognition that, as a practical matter, 'in many situations, the amount of damage under the Act will be so small that few attorneys will pursue his client's case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved.'"

A.1287, Order Granting Plaintiff's Petition for Attorney Fees and Costs ("Fee Order"), ¶5, ¶ 3 (quoting *Rice v. Mike Ferrell Ford*, 184 W.Va. 757, 762 n.7, 403 S.E.2d 774, 779 n.7 (1991) (case brought under Magnuson-Moss and the Odometer Act, 15 U.S.C. § 1989(a) (1988)) (quoting *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726 (8<sup>th</sup> Cir. 1978); *Fleet Investment Company, Inc., v. Rogers*, 620 F.2d 792, 793 (10<sup>th</sup> Cir. 1980))).

In another consumer protection context, this Court further stated, "such [attorney fee shifting] provisions provide 'the economic incentive . . . to attract competent counsel for the purpose of enforcing . . . laws that serve to protect the interests of this state's citizenry.'" *Quicken Loans, Inc. v. Walters*, 239 W.Va. 494, 503, 801 S.E.2d 509, 518 (2017) (regulation of mortgage loans) (quoting *Heldreth v. Rahimian*, 219 W.Va. 462, 467, 637 S.E.2d 359, 364 (2006) (regarding the fee shifting provision in the West Virginia Human Rights Act, W.Va. Code § 5-11-13(c))).

Under these laws and principles, the trial court's awarded of reasonable attorney fees and costs should be upheld.

In addition to the authority provided in Magnuson-Moss, *City National*, and the WVCCPA, this Court has held that an award of attorney fees and costs may be appropriate "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Muzelak, supra* (quoting Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)). Based on the facts and history of this case, attorney fees and costs were available to Ms. Delaney even without the statutory provisions.

This Court has laid out the steps a trial court should take in determining the reasonableness of an attorney fee request. First is the calculation of the amount requested.

[T]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

184 W.Va. at 760, 403 S.E.2d at 777 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Then, the trial court should balance the twelve factors from Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), to determine the reasonableness of the requested fee. *Rice v. Mike Ferrell Ford*, 184 W.Va. at 762, 403 S.E.2d at 779. Those factors are: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases."

In the Corrected Petition for Attorney Fees and Costs (“Corrected Fee Petition”), Ms. Delaney’s counsel provided support for the hourly rate sought, which Car World has not challenged, provided detailed time records explaining the hours each counsel spent on the case, and also presented a discussion of each of the 12 *Aetna* factors. A. 1138-1144 (Corrected Fee Petition, pp. 6-12). Car World filed a response that included many of the same arguments made to this Court, *i.e.*, that the number of hours was not reasonable; that an attorney fee award was not available on all of Ms. Delaney’s claims and, therefore, the number of hours should be reduced; and that Ms. Delaney did not achieve a better result than the prelitigation offer Car World asserts it made. A. 1214-1219. Yet, neither with its Response nor at the March 11, 2020 hearing on the Fee Petition, did Car World provided any evidence to support its assertions regarding the reasonableness of the hours claimed. It did not point to specific hours that it felt were unreasonable or to tasks that were not necessary for all of the claims Ms. Delaney asserted. Further, after reviewing the Corrected Fee Petition, including attachments, the Response and the Reply, and considering the arguments of counsel at the hearing, the trial court found that Ms. Delaney’s counsel had “exercised billing judgment to ensure that the time records reflect reasonable amounts of time for each counsel and eliminates the duplication of hours where the active service of two attorneys were not absolutely necessary.” A. 1284 (Fee Order, ¶ 2, ¶6).

**Appellant asserts no valid and supported argument against the attorney fee award**

Car World provides no support for its assertion, at pp. 34-35, that the number of hours claimed by Ms. Delaney’s counsel is excessive when compared to the amount of time Car World’s counsel spent on the case. Car World made the same assertion before the trial court but, neither there nor before this Court, has Car World provided any evidence to support its bald statement. Therefore, Car World has waived its right to challenge the reasonableness of the hours detailed by

Ms. Delaney's counsel. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) (declining to consider petitioner's arguments regarding the reasonableness of the respondent's counsel's hours because the petitioner did not submit evidence challenging the accuracy or reasonable of the hours before the district court and, therefore, waived the right to challenge the hours); *Cobell v. Norton*, 407 F.Supp. 2d 140, 161 (D.D.C. 2005) (where, relying on the *Blum* court's guidance, the federal district court concluded that defendants were required to submit information sufficient "to put plaintiffs on notice of those entries it deems excessive and to trigger the court's examination into the merit of those allegations" and that defendant in that case had met this requirement).

Further, as discussed above, the trial court noted in its Fee Order that Ms. Delaney's counsel was required to perform additional work as a result of Car World's failure to engage in discovery and to obey the trial court's orders, as well as counsel's time spent responding to Car World's Writ filed days before trial. A. 1284 (Fee Order, ¶ 2, ¶ 4).

Moreover, Car World's assertion that Ms. Delaney did not achieve a better result than the prelitigation offer Car World asserts it made is incorrect. Despite Car World's assertion, at p. 39, that it "agreed to return [to Ms. Delaney] all of the money she had paid in exchange for a return of the vehicle," the sworn testimony of its agents shows otherwise. Although neither testified at trial, both Car World's owner and managing member Dan Cava and its employee, John Tiano, the salesperson who sold Ms. Delaney the vehicle, were deposed in this case. Their testimony was brought to the trial court's attention in Ms. Delaney's Joint Response to Both Defendants' Motion for Summary Judgment where Ms. Delaney demonstrated the illusory nature of the purported offer. A. 735-745.

In his deposition testimony, owner Dan Cava could provide: (1) no specific dollar amount of any alleged refund offer; (2) no form of writing conveying any offer; and (3) no notes or

worksheet showing any amounts Car World was offering to Ms. Delaney. A. 562. Further, this claim of an offer to reimburse Ms. Delaney was contradicted by Mr. Tiano who testified as follows:

Q. Okay. What do you mean by “giving her money back”?

A. We would give her her money back, it would -- as per the deal, whatever the deal was, we’d rewind it.

Q. Okay. How was that conveyed to Ms. Delaney here?

A. I left a message on her phone.

Q. Okay. What did it include, “giving her money back”?

A. I don’t -- there was never any details to it. I don’t know. He just said that we would work with her and give her money back.

A. 500 (Tiano depo, p. 56). Not only could neither agent for Car World provide amounts for what it says it offered Ms. Delaney to resolve this matter prior to having to file suit but it also rejected the amount Ms. Delaney’s counsel detailed in a letter to Car World’s counsel as representing what Ms. Delaney’s out-of-pocket costs were, summarily cutting off negotiations and leaving Ms. Delaney with no choice other than to file suit. S.A. 1390. *See* 736 (footnote 1).<sup>9</sup>

Car World asserts, at p. 34 of its Brief, that Ms. Delaney was not the prevailing party at trial, despite the jury’s findings, despite the jury’s award of monetary damages, and despite the jury’s award of punitive damages. The total verdict in this case was \$18,662.09.<sup>10</sup> This result exceeded the settlement offer made by Car World at the pretrial hearing where Car World offered to settle for \$17,863.84, an amount that may seem significant until one realizes that the settlement offer totally ignored the extensive time incurred and fees earned by Ms. Delaney’s attorneys due to Car World’s abusive litigation strategy, as discussed above. A. 976-977. Having run up the

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<sup>9</sup> Ms. Delaney also addressed this issue in her Response to the Petition for Writ of Prohibition. S.A. 1351-1352.

<sup>10</sup> Car World’s assertion, at footnote 4 of its Brief, that the selling price of the vehicle that appeared on the verdict form “must be reduced by the market value” is incorrect. Both a revocation of acceptance of a vehicle and the breach of express warranty, breach of the implied warranty of merchantability, and of the Magnuson-Moss Warranty Act allow the return of the price the buyer paid for the vehicle, instead of some reduced amount. The jury in fact found that the facts of the case merited a buy back as opposed to diminished value. Car World cites no legal support for its assertion otherwise.

cost of litigation with its failures to engage in discovery, to communicate with opposing counsel and to obey the trial court's orders, all while knowing that Ms. Delaney's claim included an award of attorney fees, Car World's last minute settlement offer effectively asked her to waive her claim for an award of fees and costs she incurred in having to pursue this case.

Moreover, although Ms. Delaney may have settled the matter, for that amount before the lawsuit was filed, Car World chose not to engage in presuit negotiations and forced Ms. Delaney to file this case in order to resolve the matter. Car World should not be heard to complain about the attorney fees and costs that resulted from its chosen litigation strategy.

Also, Car World argues, in its third Assignment of Error, that the award of attorney fees and costs was error under § 46A-5-104 of the WVCCPA. In support of its argument, Car World mistakenly relies on *Wolfe v. Welton*, 210 W.Va. 563, 576, 558 S.E.2d 363, 376 (2001), for the proposition that attorney fees and costs are not available in this case. In *Wolfe*, the buyer of a used vehicle returned it to the seller on several occasions for repairs, including the replacement of the transmission for which the seller was charged. 210 W.Va. at 567-68, 558 S.E.2d at 367-368. The buyer asserted in magistrate court that the seller had failed to honor the "implied warranties of merchantability and fitness for purpose." *Id.* at 566, 558 S.E.2d at 366. The magistrate jury found for the buyer and awarded the buyer \$1,000 plus attorney fees and costs. *Id.* at 568, 558 S.E.2d at 368. The seller appealed to the circuit court which, *inter alia*, overturned the award of attorney fees and costs. On appeal by the buyer, this Court reinstated the award of attorney fees and costs, holding:

W.Va. Code § 46A-5-104 (1994) provides that "**in any claim brought under this chapter [46A] applying to illegal, fraudulent or unconscionable conduct . . . the court may award all or a portion of the costs of the litigation, including reasonable attorney fees . . . to the consumer.**" W.Va. Code § 46A-5-104 (1994). The actions of [defendant-]Appellee in denying redress to [plaintiff-]Appellant for

failing to honor the implied warranties, as found by magistrate court jury, justified the trial court in awarding attorney fees.

210 W.Va. at 576, 558 S.E.2d at 376 (emphasis added).

This Court's ruling in *Wolfe* expressly refutes Car World's argument, at pp. 37-38, that a recovery of attorney fees and costs is not allowed for claims under the WVCCPA, § 46A-6-101, *et seq.* Thus, contrary to Car World's assertion, an award of attorney fees and costs for claims brought under Chapter 46A that involve illegal, fraudulent or unconscionable conduct and/or that involve failing to honor implied warranties is available and appropriate.<sup>11</sup>

Car World incorrectly asserts, at pp. 35-36, that attorney fees and costs are not available in this case because the claims that went to the jury did not include ones for illegal, fraudulent or unconscionable conduct.<sup>124</sup> Based on Car World's repeated discovery misconduct, the trial court directed a verdict on Car World's liability in this case, which included claims for misrepresentation and fraud. The jury was instructed on these issues, including on both statutory misrepresentation and fraud and on common law fraud, and was asked to determine damages. A. TT 217 (unconscionability, fraud); 220 (common law fraud); 223 (damages)). The Verdict Form, at Part IV, also asked the jury to determine whether to award Ms. Delaney damages for Car World's "fraud and/or misrepresentation" – the jury awarded Ms. Delaney \$2,000. Thus, even under the

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<sup>11</sup> Despite Car World's assertion, at p. 35 of its Brief, there is no indication that this Court limited the express provisions of § 46A-5-104 to instances where the seller did not "undertake repairs" or where the buyer was not charged for the repairs. Further, as discussed above, most of the repairs were paid for under the extended warranty that Ms. Delaney paid extra for when she bought the vehicle. Thus, Car World's assertions that the repairs did not cost Ms. Delaney anything are misleading. Moreover, the evidence at trial showed that the vehicle has not been fully repaired.

<sup>12</sup> Car World also lists "prohibited debt collection practices" which are not an issue in this case.

standard Car World asserts, its actions meet the criteria to subject it to liability for Ms. Delaney's attorney fees and costs.<sup>13</sup>

Car World further asserts, at p. 38, that Ms. Delaney was not entitled to attorney fees and costs on her claims for misrepresentation and punitive damages. However, the cases upon which Car World relies do not appear to address the issue it purports to raise. As discussed above, attorney fees and costs are available both in misrepresentation claims brought under the WVCCPA and in misrepresentation and fraud claims brought under the common law. Further, a claim for punitive damages is not a stand alone claim. Rather, punitive damages are awarded as additional damages in a proper case where the defendant's misconduct is egregious. Thus, it is reasonable that a prevailing plaintiff may be awarded attorney fees and costs for time expended on gathering evidence to support a punitive award. However, this Court need not decide the question regarding punitive damages in this case because attorney fees are clearly recoverable under the claims brought by Ms. Delaney. Further even if attorney fees are not recoverable for work done on punitive damages, Car World has failed to demonstrate that any of the hours Ms. Delaney's counsel spent on punitive damages were not also necessary to develop and present evidence on her warranty claims. Therefore, Car World has waived its right to challenge the hours approved by the trial court.

**D. MS. DELANEY WAS ENTITLED TO CLAIM MISREPRESENTATION AS AN ELEMENT OF DAMAGES AND TO RECOVER PUNITIVE DAMAGES.**

In two paragraphs, covering one-half of a page, Car World claims Ms. Delaney cannot recover damages for misrepresentation since there was no evidence of any damages flowing

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<sup>13</sup> Car World has not objected to either the trial court's instructions or the Verdict Form in this Appeal.



therefrom. Moreover, Car World argues punitive damages were improper as there can be no punitive damages for breach of contract.

First of all, the appellant is raising error for the first time with respect to arguing error in the awarding of \$2000 in damages for misrepresentation. This Court has held that in exercising appellate jurisdiction, it will not decide nonjurisdictional questions which were not presented to the lower court. *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971). Nor did Car World, as required under Rule 10(b)(3) of the West Virginia Rules of Appellate Procedure, notify this Court that plain error is being asserted with respect to this argument since it was not raised before

Secondly, as discussed above, Ms. Delaney showed significant damages with respect to the vehicle not only based on her testimony but also the testimony as to diminished value by her expert Anthony Jakicic as set forth above.

Third, Car World's bare bones assertion, at p. 41, that Ms. Delaney should not have been awarded damages for misrepresentation is confusing and neither supported nor explained by the memorandum opinion it cites. *Mays v. Marshall Univ. Bd. of Governors*, No. 14-0788, 2015 W.Va. LEXIS 1027, 2015 WL 6181508 (Oct. 20, 2015), does not address misrepresentation, the damages available in a claim for misrepresentation, or the prerequisite showing required to be awarded damages for misrepresentation. To the extent Car World is stating that Ms. Delaney was required to prove that she was damaged, such a requirement is *axiomatic* and Ms. Delaney provided proof of her damages at trial, including the number of repairs that had to be made, the amount of time she was without the vehicle, and as noted above, further supported by expert Jakicic's testimony. Ms. Delaney properly established her claims for damages in this case, including damages caused by Car World's fraudulent misrepresentations

Finally, the appellants argument on punitive damages is – respectfully - very strange. This argument was developed and argued before the trial court and it is clear that Ms. Delaney based her request for punitive damages not on a breach of contract claim (which interestingly enough is a cause of action **not asserted** in her complaint) but on her cause of action for common law fraud and misrepresentation. This is clear from the trial courts jury instruction on awarding punitive damages for misrepresentation which stated:

As defendant Dan’s Car World has been determined to be liable for fraud or misrepresentation in the sale of the vehicle to Caressa Delaney, you may award her damages for this misrepresentation. In determining the damages to which she is entitled, you may consider any of the following:

- (1) The money paid out by the plaintiff on the vehicle;
- or
- (2) Any loss in value to the vehicle which was a result of any misrepresentation;
- and
- (3) the annoyance and inconvenience to Caressa Delaney as a result of the misrepresentations about the vehicle.

Your verdict should be for such sum as will fully and fairly compensate Caressa Delaney for the damages she sustained as a result of the defendant’s actions.

**If you award the Plaintiff, Caressa Delaney, compensatory damages to compensate her for her losses, then you may also award the Plaintiff, Caressa Delaney punitive damages. (emphasis supplied).**

Moreover, as noted above in Argument B above, Car World was not deprived of its right to defend against the claim for punitive damages.

#### **E. MS. DELANEY WAS ENTITLED TO PREJUDGMENT INTEREST**

Car World claims that the trial court’s granting of prejudgment interest on general damages is in violation of W.Va. Code § 56-6-31(b). Yet, § 56-6-31(b) clearly shows that the awarding of prejudgment interest is permissible “[i] any judgement that contains special damages.”

In this matter, the jury awarded special damages in the form of a refund of the purchase price and damages for misrepresentation and violation of the WVCCPA. General damages in the form of nuisance, aggravation and inconvenience were not awarded. In the case of *Eriksen Const. Co. vs. Morey*, 923 F.Supp. 879 (S.D. W.Va. 1996) the court noted that insofar as the jury found the defendant had committed a breach of express and implied warranties and fraud, § 56-6-31 applied and that the court must assess prejudgment interest. Thus, *Eriksen Const. Co.* case is clearly on point and this trial court's award of prejudgment interest is entirely proper.

**V. REQUEST FOR ATTORNEY FEES AND COSTS**

Pursuant to Rule 24(c) of the West Virginia Rules of Appellate Procedure, your Appellant, Caressa Delaney, respectfully requests that this Court grant her an award of her attorney fees and costs expended in defending this appeal. These attorney fees and costs are allowed under the rule if specifically provided for by law. As noted above, all of the claims successfully asserted by Ms. Delaney (*i.e.* Magnuson-Moss, revocation of acceptance, misrepresentation) allow for the award of attorney fees and costs.

**VI. CONCLUSION**

WHEREFORE, based on the foregoing discussion of the facts and applicable law in this matter, your Appellant, Caressa Delaney, respectfully requests that this Court affirm the final judgment rendered by the Circuit Court of Monongalia County, affirm the sanction of dismissal of Appellant's defenses and affirm the jury verdict in this matter as well as affirm the trial courts award of attorney fees and costs; and to further grant her attorney fees and costs incurred in defending this appeal.

  
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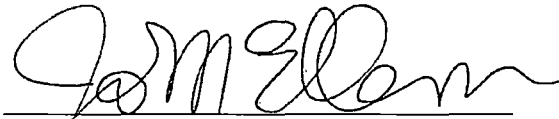
By Counsel

**CERTIFICATE OF SERVICE**

The undersigned hereby certify that on November 18, 2020, the foregoing "Brief of Respondent and Respondent's Request for Attorney Fees and Costs of Appeal" was served upon the following named parties, via first class mail, addressed as follows:

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