IN THE SUPREME COURT OF VIRGINIA

Record No. 140171

RICHARD L. OWENS, SR.
and
CYNTHIA M. OWENS,

Appellants,

v.

DRS AUTOMOTIVE FANTOMWORKS, INC.
and
DANIEL R. SHORT,

Appellees.

BRIEF OF APPELLEES

Gregory N. Stillman (VSB 14308)
Hunton & Williams LLP
500 E. Main Street, Suite 1000
Norfolk, VA 23510
Phone: (757) 640-5300
Facsimile: (757) 625-7720
gstillman@hunton.com

Counsel for Appellees,
DRS Automotive Fantomworks, Inc. and Daniel R. Short

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I. STATEMENT OF CASE

Richard L. Owens, Sr. and Cynthia M. Owens filed a Complaint against DRS Automotive Fantomworks, Inc., and Daniel R. Short in the Circuit Court of the City of Norfolk. Their Complaint contained three counts as a basis for recovery: (1) breach of contract; (2) fraud; and (3) violation of the Virginia Consumer Protection Act ("VCPA).

After three days of trial, the trial Court struck the Owens' fraud and VCPA claim. The jury returned a defense verdict on the remaining breach of contract claims. No error was assigned to the jury's verdict or to the trial court's decision to strike the count relating to common law fraud.

Left for the Court's consideration are three assignments of error, all pertaining to the Court's decision to strike the Appellants' VCPA claim. The allegations in the Complaint, upon which the Appellants' VCPA claim are based, are very specific. First, Mr. and Mrs. Owens alleged that Defendants "willfully deceived and misrepresented to the Owens the cost of parts used to perform renovation and repairs" to a 1960 Thunderbird. J.A. at 6. Second, Mr. and Mrs. Owens alleged that Defendants "failed and refused to

provide supporting documentation relating to the purchase of the 2001 Ford."[1] J.A. at 6. Finally, Mr. and Mrs. Owens made an "information and believe" allegation they were charged "more than a 25% markup on the parts used to restore and repair the T-Bird." J.A. at 6. Mr. and Mrs. Owens concluded their VCPA claim by alleging that collectively these facts constituted a "willful violation of the VCPA, as it was deceptive, fraudulent, false and a misrepresentation in connection with a consumer transaction." J.A. at 6. To prove these allegations, Mr. and Mrs. Owens were required to prove that Defendants lied to the Plaintiffs when they represented to them that a donor car, used for parts, cost more than what was actually paid.

After hearing all of the evidence, the trial Court struck the Plaintiffs' evidence as it pertained to their VCPA claim, observing, among other things, that there was no evidence of any fraud. Because the Appellants now contend that no evidence of fraud is

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[1] This alleged failure, standing alone, is clearly insufficient to support a VCPA claim unless there was some contractual obligation to do so. And on this, the jury has already concluded that there was no contractual obligation on the part of the Defendants to provide cost information. Even so, it was provided, both in the form of a Bill of Sale and an amended Florida title reflecting the purchase price of $6,000.

required to make out a claim under the VCPA – even though they themselves alleged fraud as a basis of recovery under the Act – Appellants assign error to the Circuit Court's decision to strike their VCPA claim. They do so even though no evidence of fraud or misrepresentation of any kind was introduced to support it.

The entire factual predicate for Appellants' VCPA claim was based upon the allegation that Defendants paid less for a donor car than what had been represented to Mr. and Mrs. Owens. They allege that this misrepresentation was intentional and done with the intent to deceive. The Complaint made no other allegations to support their VCPA claim. Appellants argue: "If the jury had been permitted to find that DRS paid $2,000 for the donor car, as shown by plaintiffs' circumstantial evidence, (discussed *infra*), and contrary to Mr. Short's and Mr. Thiess's testimony that it paid $6,000, then it could have found that defendants committed fraud" *(emphasis added).* See Appellants Brief, p. 4-5.

Even a superficial examination of the record in this case demonstrates that there was no such "circumstantial" evidence and that the testimony of Mr. Short and Lt. Thiess was completely unrebutted. For this reason, the trial court had no alternative but to

strike the Appellants' VCPA claim. There was simply no evidence to support it, whether it be fraud or anything else.

This appeal should not, as Appellants suggest, become a referendum upon whether actual intentional fraud is required to make out a *prima facie* case under the Virginia Consumer Protection Act. To the contrary, no one, not the trial court or the Appellees, have ever suggested otherwise.[2]

In fact, it was Mr. and Mrs. Owens who alleged actual fraud as a basis for recovery under the VCPA. It was Mr. and Mrs. Owens who alleged (and this was their only VCPA allegation) that Defendants violated the VCPA by <u>intentionally</u> misrepresenting the cost of a donor car purchased to supply parts (principally an engine) necessary to complete the restoration and modification of the 1960 Thunderbird owned by Mr. Owens.

Since actual fraud was the basis of Plaintiffs' VCPA claim, the trial court understandably made the observation that it saw no

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[2] The Attorney General has filed an Amicus Brief, asking the Court to use this case as an opportunity to clarify the law regarding the necessity to prove fraud in a VCPA claim. This case does not seem to be the appropriate vehicle to do this, as neither the Appellees nor the trial Court ever suggested that actual fraud was the only basis for a VCPA claim. It simply happens to be the basis asserted by the Plaintiffs here.

evidence of fraud. But the trial court went still further by observing that it found no reason not to believe the only evidence introduced regarding the actual price of the donor car.

To prove their VCPA claim, Defendant called the only two witnesses with knowledge of what was paid for the donor car – Dan Short (Buyer) and Navy Lt. Alexander Thiess (Seller). Both testified without contradiction that Mr. Short paid $6,000 for the donor car.

Contrary to the representations in Appellants' brief, there was no evidence, circumstantial or otherwise, to support a factual finding by the jury that the donor car's price was anything but $6,000. Based upon this observation, and the Court's observation that he had no reason not to find the testimony of Navy Lt. Thiess and Dan Short credible, the Court refused to allow the Appellants' VCPA claim to go to the jury.

II. STATEMENT OF FACTS

Appellants' rendition of the evidence introduced at trial is more argument than fact. There was no evidence, circumstantial or otherwise, for any jury to conclude that Defendants paid anything other than $6,000 for a donor car used to supply replacement parts for the restoration and modification of a 1960 Ford Thunderbird.

Dan Short is a retired Army Major, having joined the Army in 1980 as an enlisted man. J.A. at 471, 472. While on active duty, he received an active duty college scholarship, graduated in two years and was commissioned. J.A. at 471. He was then sent to flight school and became a certified pilot. J.A. at 471.

In 1997, he received an appointment to the Naval Postgraduate School to study for a Master's degree in Systems Engineering and Program Management. Mr. Short retired from the Army in 2005, when he founded his company, DRS Automotive Fantomworks, Inc. J.A. at 46. Because Mr. Short is himself a disabled veteran, he founded Fantomworks to support his charitable foundation called Wounded Wheels. J.A. at 473. The mission of Wounded Wheels is to build and modify muscle cars for paralyzed veterans. J.A. at 474. Mr. Short takes no salary from DRS Fantomworks. J.A. at 474.

In July of 2012, Mr. and Mrs. Owens purchased a 1960 Ford Thunderbird in Rhode Island. The car's odometer showed 165,000 miles. J.A. at 244. The car was purchased without any inspection, either of the car's structural components, its engine or drivetrain. J.A. at 301. In fact, Mr. and Mrs. Owens did not even open the

doors. They did nothing to confirm that the car would start, or whether it could be driven. J.A. at 302.

While the car was still in Rhode Island, Mr. Owens approached DRS, through Mr. Short, about a partial restoration and modification. J.A. at 300-301. In particular, he wanted DRS to provide a new fuel-ejected engine, new brakes and a modern suspension. J.A. at 573.

Under these circumstances, Mr. Short was obviously unable to provide a fixed price, but estimated that the cost to do what Mr. Owens required (assuming no surprises upon actual inspection and no changes in the scope of the work), would be no more than $40,000. Mr. Owens nonetheless elected to proceed, and decided to do so without a written contract. J.A. at 299. During the initial meeting, Mr. Short suggested that it would be less expensive to purchase a "donor car" to use its engine and perhaps some of the parts. J.A. at 297, 497.

When the car arrived at DRS for initial inspection, some structural rust in the frame was obvious. J.A. at 423. Upon closer inspection, it was apparent that someone had previously attempted to hide the rust with fiberglass and undercoating. J.A. at 424.

There was no evidence introduced that Mr. Short ever represented to Mr. or Mrs. Owens that purchasing a donor car would affect his overall estimate of the costs to do the work. It was, according to Mr. Short, simply the most economical way to proceed. J.A. at 71.

Before purchasing the car, Mr. Short telephoned Mr. Owens that he had found a suitable donor car, described its condition, and the fact that the engine had less than 100,000 miles. J.A. at 499.

On or about July 13, 2012, Mr. Short purchased a 2001 Ford Police Interceptor from Navy Lt. Thiess. J.A. at 628, 629. The purchase price was evidenced by a Bill of Sale and was recorded on the Florida Certificate of Title. J.A. at 628-629. That purchase price was $6,000.

Throughout the Appellant's brief, they argue that sufficient "circumstantial" evidence was introduced to infer that the Defendants paid only $2,000 for the donor car. No such evidence was ever produced, circumstantial or otherwise.

To support this theory, Appellants rely in part upon the fact that DRS gave Lt. Thiess (a pilot in the United States Navy), a check in the amount of $2,000, not $6,000. Yet, Lt. Thiess testified

without contradiction that he also received $4,000 in cash from Mr. Short. J.A. at 330.

Why was the transaction structured this way? Lt. Thiess explained:

> I suggested to him (Mr. Short) that because I did not have time to complete the sale that night – I had other obligations – that I agreed it would be fair for him to give me part of the total price, which was $4,000 cash, on the spot to ensure that at least some of the payment would be made… in exchange, I gave him a copy of the title,…. We made an agreement to meet at a later date to complete the transaction, at which point I would give him the actual car and he would give me the remaining $2,000, which is in the form of a check.

J.A. at 368.

According to Appellants, this is supposed to be "a key issue in this appeal." Appellants' Brief p. 10. In what alternative universe does this evidence, which was completely unrebutted, provide any trier of fact with the opportunity to reach any other conclusion, other than Mr. Short paid $6,000 for the donor car?

Appellants have only one response, all pertaining to an alleged email that was never produced or even shown to have ever been authored in the first place. Appellants' argument is imaginative

but lacks any evidence to support it. It is true that Lt. Thiess had previously advertised his car for sale at a price of $2,000, on Craigslist. According to the Appellants, Mr. Short must have been aware of this offer because he allegedly sent an email to Lt. Thiess through Craigslist on July 13, 2012.

Neither Lt. Thiess nor Mr. Short have any recollection of sending or receiving any such email, and more important still Mr. Short has no recollection of ever seeing the Craigslist advertisement. So from this, Appellants continue to argue that they presented sufficient evidence to sustain a claim under the Virginia Consumer Protection Act.

Subpoenas were issued to Navy Lt. Thiess, to DRS and to Mr. Short. No such email was ever found, notwithstanding the Appellants' allegation that it was directly relevant to their VCPA claim as it "would have allowed the jury to <u>infer</u> (*emphasis added*) that DRS and Mr. Short committed an act of deception, fraud, false pretense,... or misrepresentation in connection with a consumer transaction." Appellants' Petition for Appeal, p. 29. At best, the hearsay Craigslist log allows only the inference that someone – not necessarily Mr. Short – at DRS sent an email to Lt. Thiess. It does

nothing to prove what the person knew or when they knew it. But most of all, it does nothing to prove that Mr. Short did not pay $6,000 for the donor car.

The alleged missing email was so important to Appellants that they attempted to assign error to the trial Court's refusal to grant a missing document instruction, which would have instructed the jury to draw a negative inference from Defendants' failure to produce it. This attempted assignment of error was denied.

The evidence at trial was clear and unrebutted. Mr. Short gave Mr. Owens an initial non-binding estimate of $40,000 to complete the restoration and modification of a 1960 Ford Thunderbird, based upon an initial meeting and before any actual inspection of the vehicle. J.A. at 300. But there was never any agreement that this price would not change in the event that the scope of work might be amended, or additional rust was discovered. J.A. at 533. Undisclosed rust, not readily apparent, was discovered during the restoration process. J.A. at 532. And the scope of work requested by Mr. Owens was substantially amended. J.A. at 504, 505.

Mr. Owens frequently amended the scope of work, and had done so as late as September 11, 2012, some two months after the donor car had been purchased.[3] See Plaintiffs' Exhibit 12. J.A. at 585. Then on September 22, just eleven days later, Mr. Short received a letter from Mrs. Owens, representing herself as representing Mr. Owens. J.A. at 586. In that letter, and for the first time, Mrs. Owens made numerous demands for documentation of expenditures, parts and labor rates, even though there was never any agreement that this level of detail would be required. J.A. 502.

The letter went on to threaten legal proceedings in the event that Mr. Short did not comply with her demands within five days. J.A. at 586.

Mr. Short testified that he was "stunned" by the letter.

> I was actually stunned by it. Nothing like this has ever happened in our company, 1600 plus customers.... What confounded me is how we went from questions..., and we answered all of the questions,... and after all the questions were answered, Mr. Owens asked for more additional work. So to me,

[3] This is important. For two months after the donor car was purchased, and Mr. Owens was notified of its $6,000 price tag, Mr. Owens continued to amend the scope of work.

> that was a fairly good indication that everything was good.

J.A. at 505.

As a result of this letter and threats of litigation, Mr. Short advised Mr. and Mrs. Owens that he would suspend work until all issues were resolved between the parties. J.A. at 506, 507.

Mr. Short then invited them to come in and discuss their areas of disagreement. That offer was refused. J.A. at 507. Mr. Short then offered Mr. and Mrs. Owens the opportunity to pick up their vehicle. That offer was also refused. J.A. at 507, 295, 296.

At no time during the course of the project did Mr. and Mrs. Owens complain about the quality of any of the work being done on the vehicle. J.A. at 507.

III. ARGUMENT

A. The Trial Court Did Not Err Because it Found Two Witnesses to be Believable.

Standard of Review.

This Assignment presents a question of law and can be reviewed *de novo* for legal error.

The Appellants seek to assign error to the trial Court's assessment that the testimony of two witnesses, Dan Short and

Navy Lt. Alexander Thiess was credible. While the trial Court did find this testimony credible, the reasons for his assessment of their credibility is misleading and taken out of context.

The Plaintiffs have argued that they had made out a *prima facie* case that the Defendants had violated the Virginia Consumer Protection Act based entirely upon the testimony of the only two witnesses with knowledge of how much was paid for a donor car. In essence, this alleged conspiracy theory then required the Court to assess the witnesses credibility, as there was insufficient evidence upon which he could conclude that the facts were anything other than what they said.

Had the Plaintiffs offered any evidence sufficient to enable the jury to believe that both Lt. Thiess and Mr. Short were lying, the trial Court's assessment of their credibility would have clearly been inappropriate. But in the context of the evidence, the Court was merely observing that he found no other reasons to believe that they had not testified truthfully. This was especially so when the direct documentary evidence – a bill of sale prepared on the date of the sale, and a title – corroborated their testimony.

The Appellants seem to be laboring under the assumption that some circumstantial evidence, suggesting the mere possibility that Mr. Short may have known that Lt. Thiess had previously offered the car for sale at $2,000, is sufficient to allow a trier of fact to believe that he in fact paid that amount when both he and Lt. Thiess testified unequivocally that he paid $6,000. The trial Court found that suggestion, particularly in light of any direct evidence to the contrary, to be preposterous.[4]

To accept Plaintiffs' theory of the case, a jury would have to believe that:

- Mr. Short and Lt. Thiess conspired to defraud Mr. and Mrs. Owens.
- Mr. Short committed perjury when he testified that he paid $6,000 for the donor car.
- Lt. Thiess, who had no motivation to lie, committed perjury when he testified that Mr. Short paid $6,000 for the donor car.
- Mr. Short purposely deleted an email (without any evidence that it was even

[4] There was no evidence that Mr. Short ever saw an earlier Craigslist advertisement. Plaintiffs' Exhibit 25 is not self-explanatory and no witness offered any testimony about what, if anything, it shows. And under no interpretation is it evidence that Mr. Short actually saw any ad or sent any email.

authored by him in the first place) allegedly sent to Lt. Thiess.

- Lt. Thiess also purposely deleted an email and risked contempt of court, even though he had no financial stake in the outcome of the case.

Moreover, the jury would have been required to consider what Mr. Short and Lt. Thiess had to gain by such a conspiracy, as Mr. Short charged a twenty five percent markup on parts. Had he in fact paid $2,000 for the donor car, he would have charged Mr. Owens an additional $500. Here, Mr. Owens was charged an additional markup of $1,500. So the motivation for this grand conspiracy, according to the Plaintiffs, was to make an additional $1,000.

And so, for Appellants' conspiracy theory to have any credibility, the jury would be required to believe that Lt. Thiess committed perjury so that DRS could earn an extra $1,000. Just what the motivation was for Lt. Thiess to do that remains a mystery.[5]

While the trial Court judge observed and found the testimony of Lt. Thiess and Mr. Short to be credible, Judge Clarkson was not

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[5] The Appellants' argument on this point strains credibility, suggesting that they themselves provided him with motivation to lie because their own abusive treatment of him during the litigation.

weighing the evidence. There was nothing to weigh. Rather, he was simply observing that it was the only evidence available for the jury to consider and he found no reason not to believe it.

Appellants' reliance upon *Carter v. Lambert*, 246 Va. 309, S.E. 2d (1993) is misplaced. There the trial Court set aside a jury verdict even though there was a clear and unequivocal conflict in the evidence for the jury to resolve.

This was not the case here, where the Appellants' only witnesses testified unequivocally that $6,000 was the price paid for the donor car. Appellants argue that their VCPA claim should have been submitted to the jury based upon an implausible inference that Mr. Short may have seen an earlier ad offering to sell the car for $2,000. Even if he had seen such an ad, and he testified unequivocally that he did not, this hardly qualifies as proof that he did not pay what both he and Lt. Thiess testified to - $6,000.

> Where the plaintiff calls a defendant as an adverse witness, the plaintiff is bound by such of the defendants' testimony as is clear, reasonable and uncontradicted....

Ragland v. Rutledge, 234 Va. 216, 361 S.E.2d 133 (1987).

> Like presumptions, inferences are never allowed to stand against ascertained and

> established facts… *(citations omitted)*. …[a]n inference which the plaintiff says would impose liability upon the defendants must give way to the positive, uncontradicted evidence which exonerates the defendants from liability and demonstrates that the inference is based upon speculation and conjecture.

Ragland at 219.

> When a defendant is called as an adverse witness the plaintiff is not bound by such of his testimony as is in conflict with evidence introduced by the plaintiff; <u>but the plaintiff is bound by so much of the testimony of the defendant as is clear, reasonable and uncontradicted</u>. *(emphasis added).*

Weddle v. Draper, 204 Va. 319, 322, 130 S.E. 2d 462 (1963).

Here, when called by the plaintiff, the testimony of Mr. Short and Lt. Thiess was clear and uncontradicted on the price paid for the donor car. That price was $6,000.

B. The Trial Judge Did Not Err Because he Never Found that Proof of Fraud was Required in a VCPA Claim.

<u>Standard of Review.</u>

These issues present an issue of statutory construction and is a pure question of law.

This case should not become a referendum upon whether a VCPA claim requires proof of actual fraud. Appellees have never contended otherwise, and neither did the trial Court so rule.

The trial Court merely observed that he found no evidence of fraud because only fraud was alleged as the basis for Appellants' VCPA claim. The only allegations made by the Appellants to support the VCPA claim are that Mr. Short "willingly" and "deceptively" charged the Owens more than a 25% markup on the parts used to restore and repair their 1960 Ford Thunderbird. The alleged violations of the VCPA were alleged to be "willful" and made with an intent to deceive.

Appellees readily concede that a provider of commercial services can violate the VCPA without committing fraud. One might allege that a service provider misrepresented his qualifications. One might allege that a service provider misrepresented the time necessary to complete a project. No such allegations would require proof of fraud or intent to deceive.

There was no allegation in the Complaint that the defendants misrepresented their ability to do the work in a workmanlike manner. Mr. Short's qualifications, or lack thereof, were never alleged as a

basis of the VCPA claim. There were no allegations that Defendants failed to perform the scope of work as was agreed. To be sure, no such allegations require proof of fraud. But when one alleges fraud – and only fraud – as a basis of recovery under the VCPA, one must be expected to prove it. And here, the Court found no such evidence to have been offered.

And so when the trial court observed that there was no evidence of any fraud, he was merely observing that the Appellants failed to prove what they themselves had alleged as a basis for recovery under the VCPA.

The rhetorical question must be asked. If they were unable to prove that the Defendants lied about the price of the donor car, or that they engaged in a deceptive misrepresentation, (their own words) what did they prove?

The cases cited by the Appellants do nothing to advance the dilemma created by their own pleadings. To be sure, there are numerous violations of the VCPA which do not require any proof of fraud. But when one alleges that a defendant's actions are fraudulent, and no other basis for recovery is articulated, how else is their proof to be measured?

In the end, none of this is material in any event. Not only was there no evidence of fraud, there was no evidence of any kind introduced to sustain a cause of action under the VCPA. Even the refusal to provide documentary evidence of one's actual costs is not actionable unless there was some contractual obligation to do so. If the trial Court committed any error by finding no evidence of fraud, it was surely harmless.

C. There Were No Other Allegations Made to Support the Plaintiffs VCPA Claim.

Standard of Review.

This Court can easily review the allegations in the Complaint and judge for itself whether the Plaintiffs made the allegations they now claim to support this VCPA claim. That review can be made under any standard: *de novo*, clearly erroneous, or abuse of discretion. The result will be the same.

The Appellants now argue, for the first time, that "other" evidence provides support for this VCPA claim. Now, for the first time, Appellants argue that Mr. Short and DRS misrepresented his "certifications" on his website. A cursory examination of the Complaint will plainly show that no allegation was ever made

complaining that such a misrepresentation ever occurred, or that it was even material to the Plaintiffs' decision to retain DRS or Mr. Short. Only now do the Plaintiffs argue that Mr. Short's alleged misrepresentation about his certifications provide the factual basis for their VCPA claim. The suggestion that this now provides the evidentiary basis for a claim under the VCPA strains credibility.

But it doesn't stop there. Appellants now argue – again for the first time – that the engine in the donor car was not a "certified" engine, whatever that even means. But again, even a cursory review of the Complaint will show that this was never a basis for this VCPA claim. Nor was this argument ever made to the trial Court. Neither did the Plaintiffs ever testify that having a "certified" donor engine was material to their motivation or reliance upon DRS, Mr. Short or the use of the replacement engine purchased from Lt. Thiess. To the contrary, Mrs. Owens testified that she did not care what kind of engine was used as long as it was reliable. J.A. at 313.

This "other evidence" alleged to provide a basis for the Appellants VCPA smacks of desperation, nothing more.

IV. CONCLUSION

Even though the trial Court struck the Plaintiffs' VCPA claim, the jury did consider and make short order of their breach of contract claims. A principal component of the Plaintiffs' breach of contract claim, once again, is that Defendants charged more than its published 25% mark up for parts. In other words, Plaintiffs are again alleging that Defendants really paid only $2,000 for the donor car.

So the jury heard all of the Plaintiffs' evidence about the alleged missing email and what the so called Craigslist log was supposed to show. Having heard the evidence, the jury returned a defense verdict with little deliberation.

Had the jury believed for one minute that an officer in the United States Navy and Mr. Short, had conspired to perjure themselves regarding the price actually paid for the donor car, surely their verdict on the plaintiffs' breach of contract claim would have been favorable to the Plaintiffs.

The jury's verdict serves as the most eloquent metaphor for the strength of this case. There is no reason to believe that if the case were tried again, the result would be any different. Judge

Clarkson did nothing to usurp the prerogative of the jury here. The trial Court was merely serving its essential role of being the gatekeeper – to prevent claims without evidence from consideration by the trier of fact.

There is no compelling reason for this case to become a referendum on whether actual fraud is required to prove a VCPA claim. No party in the case contends otherwise.

For these reasons argued, the jury's verdict and trial Court's Order should be affirmed and the Plaintiffs' case dismissed.

DRS AUTOMOTIVE FANTOMWORKS,
INC. and DANIEL R. SHORT

By: _____
Counsel

Gregory N. Stillman (VSB #14308)
HUNTON & WILLIAMS LLP
500 E. Main Street, Suite 1000
Norfolk, VA 23510
Phone: (757) 640-5300
Facsimile: (757) 625-7720
gstillman@hunton.com
Counsel for Appellees,
DRS Automotive Fantomworks, Inc.
and Daniel R. Short

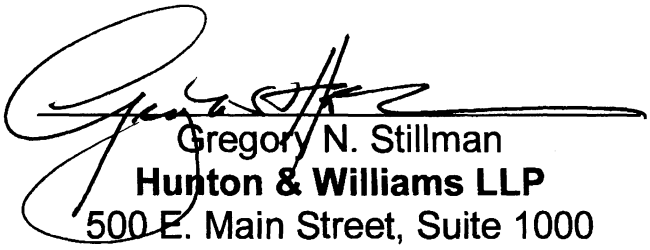
V. CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25th day of July, 2014, pursuant to the Rules of the Supreme Court of Virginia, fifteen (15) copies of the foregoing Brief of Appellees, and one electronic copy (CD), have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed postage prepaid to:

George A. Somerville (VSB 22419)
George.Somerville@troutmansanders.com
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
Telephone: (804) 697-1291
Facsimile: (804) 698-5149
Counsel for Appellants

Mark R. Herring
Rhodes B. Ritenour
Richard S. Schweiker, Jr. (VSB 34258)
Stephen J. Sovinsky (VSB 85637)
Cynthia E. Hudson
David B. Irvin (VSB 23927)
Office of the Attorney General of Virginia
900 E. Main Street
Richmond, VA 23219
Telephone: (804) 786-4047
Facsimile: (804) 786-0122
Counsel for the Commonwealth of Virginia

I also certify that in compliance with Rules of Virginia Supreme Court, the foregoing Brief does not exceed the word count limitation. This brief contains 4,759 words, excluding those parts specifically exempted by the Rules of this Court.



Gregory N. Stillman
Hunton & Williams LLP
500 E. Main Street, Suite 1000
Norfolk, VA 23510
Telephone: (757) 640-5300
Facsimile: (757) 625-7720
gstillman@hunton.com

Counsel for Appellees,
DRS Automotive Fantomworks, Inc.
and Daniel R. Short