

II Clarification of Plaintiff's Position on Several Issues

1. On December 8, 2005, As a Matter of Law, Judge Davis Did the Right Thing by Granting the Motion for Substitution of Judge

Plaintiff's motion for substitution of judge shall be granted as a matter of law (Plaintiff's Brief, pp13-14; Plaintiff's Reply p. 4 and citations therein). Contrary to Defendant's contention at page 15 of its Brief, a line of unbroken precedents in Illinois existed, including those already cited in Plaintiff's Brief and Reply, which showed, as Defendant admitted, that there is no difference between the **filing** date and **presentation** date of motion for substitution of judge. For example, in In re C. M. A., 306, Ill. 3d 1061, 715 N. E. 2d 674, 689 (First Dist. 1999), the court states that "It has long been the law in Illinois that if a petition for substitution of judge is timely made and it is in the proper form, the trial court has no discretion to deny it, and any other order entered after its presentation is a nullity. [Citations therein]." In that case, the filing date and presentation date is the same. In Kern v DaimlerChrysler Co. et al., 848 N. E. 2d, 125, 129 (5th District, Ill. App. Ct., 2006), the Court provided that the underling principle for requirement of an immediate action, by stating: "The well-grounded principle of judicial impartiality provides for the foundation for the rule requiring an **immediate decision** on a motion for substitution of judge." (Emphasis added). The same Court addressed the priority-of-motion issue and rejected an argument, which was the same as presented by the Defendant in the instant appeal.

As well known, in the circuit court, a court clerk, not a party, set the hearing date. If a judge could enter adverse ruling against a party, which filed a 735 ILCS

5/2-1001(a)(2) motion, between a filing date and hearing date, it would render the statute meaningless. For this reason Defendant's argument is frivolous. In the instant case, Plaintiff filed her motion on November 3, 2005 (S 187-189). That is the earliest possible date for her to file the specific motion. As such, Defendant's argument such as "testing water" has no factual ground; it is flagrantly false. .

In sum, Plaintiff's motion for substitution of judge is timely and properly filed. On November 8, 2005, Judge Davis should not ignore the November 3, 2005 motion at hand (S 205 at ¶1), or defer a ruling on a motion for substitution of judge; he should not deny this motion on November 17, 2005 (C 027) and on November 29, 2005 (S 203- 209; A128)). But the truth is that Judge Davis eventually did the right thing professionally, by granting Plaintiff's November 23, 2005 Motion for Reconsideration on November 17, 2005 Order (S 210-215).

2. Plaintiff's Fundamental Rights Were Deprived. The Judgment Entered at the Trial Court is Predetermined

In her Brief, Plaintiff raised an extremely important issue, that is, whether her constitutional and statutory rights had been deprived before and at trial. Plaintiff has already provided serious and strong arguments and list facts in support of her position (Plaintiff's Brief pp. 34-42; Plaintiff's Reply 13-15). It is in the record that the Defendant completely failed to respond on this issue. Plaintiff believes that she deserves a complete, just and fair review from this Court.

It is in the record that, at courtroom 1104, a trial date was set first, but discovery started later on Plaintiff's request, and in this case, there was no Rule 218 conference was arranged and held. Illinois Supreme Court Rule 218. And

Defendant did not disclose what trial exhibits it would present; further, according to Defendant's admission, its counsel did not even know what Plaintiff's allegations were still viable. (S 050 at ¶8). All these facts show that the instant suit was processed as, or, like a small claims.

In the following, Plaintiff would like to provide further analysis on this issue based on one more piece of document, which might have been overlooked. As pointed out at page 34 of Plaintiff's Brief, at C 662 or A 073 in the record, there is a Judge Rhine's handwriting note or order entered on September 29, 2006. It says "Trial by Court, finding for Defendant. Defendant to return the Vehicle at Δ's expense within 14 days."

Notably, the trial for this case was held on November 22 and December 1, 2006; it is important to note that the text in the note is almost the same as those in the December 1, 2006 Order, and it is indisputable that there was no testimony from any Defendant's witness on and before September 29, 2006. Plaintiff believes that any reasonable person can reach the conclusion that the December 1, 2006 judgment is predetermined, not based on testimonies from any witnesses. As a result, at the very least, every issue in this case should be reviewed de novo because the two-months-later bench trial was meaningless and it was chaos. As such, review standard of manifest weight of the evidence would be improper for any issue in this case, because the predetermined decision is not based on any evidence in the first place.

From Plaintiff's point of view, it would be accurate to say that her rights of due process had been further violated, as the presiding judge predetermined the

outcome of the case without any evidence to support it. Also the December 1, 2006 Order runs counter with 735 ILCS 5/2-1203.

3. Lack of Jurisdiction for Judge Rhine And/Or the Trial Court

First of all, Plaintiff has never challenged the Jurisdiction of the Circuit Court of Cook County. At pp 10-12 of its Brief, as the subtitle I B showed, Defendant implied that Plaintiff did, but it failed to cite any part of a Plaintiff's statement on this important issue. In this respect, Defendant is misleading this Court with false insinuations. It is very important to note that after Plaintiff filed her Proposed Bystander's Report on January 5, 2007, Defendant failed to comply with Illinois Supreme Court Rule 323 (c), it failed to submit a timely response. On February 1, 2007, in order to prevent the trial court from certifying Plaintiff Bystander's Report, the same Defendant's lawyer vigorously argued that after the instant appeal started, the trial court had no jurisdiction to certify a Bystander' Report.

As this Court pointed out: "The Municipal Division hears civil cases at law, which seek compensatory and consequential money damage under \$30, 000. General Orders of the Circuit Court of Cook County No. 1, 2. Sec. 2.3 (b)(1) " (Order p 6.). But according to Defendant's own admission, at trial, the Dealer "would ask for in **excess** of \$30,000 in its Counterclaim." (Emphasis added). (S 50 at ¶10). As such, both the trial court in the Municipal Division and Judge Rhine shall lose jurisdiction from the moment the Dealer made the wild claim. When Plaintiff filed her Second Amended Complaint, the listed damage therein was \$10,789.33 (for compensatory damage) + \$15,000 (for emotional distress) = \$25,789.33 (A 015). That was within the monetary jurisdiction limit of the

Municipal Division as stated in the Complaint (A 007). But on July 10, 2006, Count IX pursuant to the "Odometer Act" was granted (A 140), the reward sought would be more than three times of \$10,789.33 as the least. Therefore, this case should be transferred to Law Division in the Circuit Court of Cook County on or after that day. In 2006, Judge Rhine put his written notice outside of Courtroom 1104, which said: "The Illinois Supreme Court has amended the definition of a small claims to amount up to \$10,000 effective January 1, 2006." The instant suit was transferred to Courtroom 1104 on December 8 of 2005. At that time, the jurisdictional limit for small claims court was \$5,000. Illinois Supreme Court Rule 281. Defendant contended in its Brief at page 12 that "Cook County rules and orders do not differentiate between 'small claims' and other Municipal Division cases." That is not a correct statement of law and fact. Furthermore, it is very well established that, even a court has jurisdiction, a judge would lose his or her jurisdiction in a case, like in this one, if a person's due process right or statutory right was violated, or the judge renders judgment based on void orders (Plaintiff's Brief pp.12 and citations therein).

4. Defendant Committed and is Still Committing Fraud on Court

"Fraud upon the court" is fraud, which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. Bulloch v. United States, 763 F 2d 1115, 1121 (10th Cir. 1985); Kenner v. C. I. R., 387 F. 2d 689, 691 (1968). As such, this issue should not be overlooked. Without participation of their counsel, few litigants have the capability to commit fraud upon on court. And it is well established that the courts

have the power to investigate whether it has been a victim of fraud. Chambers v. NASCO, Inc., 501 U. S. 32, 44 (1991).

As stated in the instant Petition at Section I, there are fraudulent statements on material facts in Defendant's so-called Bystander's Report and in its Brief. Defendant did not and could not point to any record to support its purported Bystander's Report, and the essential parts of its "Statement of Facts" in its Brief heavily relied on or solely relied on its purported Bystander's Report, created and submitted on July 24, 2007.

As this Court will see, for two or three years, in the Circuit Court of Cook County, Defendant did not argue on what Judge Lewis asked both parties to do on October 11, 2005, Defendant did not argue why its motion to dismiss was stricken on October 20, 2005; and Defendant did not argue on what "on plaintiff's motion" meant on the December 8, 2005 Order, which was issued by Judge Davis. The reason is simple: any serious person there would find out the truth in minutes by making several phone calls.

The record shows that, in the trial court, before the November 8, 2005 hearing, Defendant did not "re-file" its motion to dismiss, which was stricken on October 20, 2005. As such, Defendant was at default for failure to plead from October 20 to November 8, 2005. Therefore, without any doubt, Defendant is providing false statements on a material fact in the "Statement of Facts" section of its Brief, arguing it had re-filed the motion to dismiss. (Defendant's Brief at page 6).

Further, Defendant shall not be allowed to rewrite history by creating a so-called Bystander's Report with outright falsehood, and Defendant should not be

allowed to select issues for review, then, expect this Court to rule on a different case, in which Defendant provided its own version of Plaintiff's allegations and assertions. Further, it is extremely improper and unfair when Defendant, for the first time, intended to cast doubts on one circuit-court order which granted a motion for substitution of judge, then, impose a duty on this Court to figure out what "on Plaintiff's motion" meant on the December 8, 2005 Order.

In the instant case, it is determinative to clarify that Plaintiff's November 3, 2005 Motion for Substitution of Judge had been granted on December 8, 2005. Defendant intends to create confusion on this matter, and then, it provides superfluous arguments on the propriety of the November 8, 2005 dismissal on Counts VII and VIII, in order to derail the appeal process, this constitutes Fraud on Court. Even for this reason alone, both Defendant and its counsel should be sanctioned pursuant to Illinois Supreme Court Rule 375. Bright v. Dick, 166 Ill. 2d 204, 210 (1995)

5. Errors Exist in the September 30, 2008 Order from This Court

The issue raised by the following questions are so fundamental that they should not be overlooked: (1) whether Plaintiff's motion for substitution of judge was granted on December 8, 2005; (2) whether Judge Davis had the authority to issue the November 8, 2005 order; (3) whether the denials of Plaintiff's motions for reconsideration of November 8, 2005 order filed in November of 2005 were proper, (4) whether Defendant's Counterclaim and Plaintiff's claims on and after December 8, 2005 exceeded the monetary jurisdiction limit for Judge Rhine, the trial court at Room 1104 and the trial court in the Municipal Division; (5) whether

Judge Rhine had ever lost his jurisdiction at any time in 2006 and at trial. Plaintiff believes that if the answer for any of these questions is positive, as it should be, correction of the Order from this Court should be necessary. People ex rel. Brzica, 268 Ill. App. 3d 420, 423 (1994)

Further, Plaintiff believes that “fraud upon court” is another equally fundamental issue, which has to be resolved, when analysis, argument and cited evidence in this Petition are considered. To be just and fair to each party, conclusion should be reached by answering three questions: (1) whether Defendant committed fraud on court during the instant review process; (2) whether Defendant committed fraud on court in the proceedings at the trial court; and (3) whether the dismissal of Count X in the Complaint was proper.

6. Inconsistencies Exist in the September 30, 2008 Order

(1) First of all, this Court was misled by Defendant’s incorrect statements on Plaintiff’s position, as to the legal standard for evaluating Count IX (violation of MVICSA, or the “Odometer Act”). (Order page 16; Defendant’s Brief p 23; and Plaintiff’s Brief pp 18-20). As a preliminary matter, Plaintiff had never argued in anywhere, let alone “in her Brief”, that “an ‘intent to defraud’ is not a requested element of a claim under [49 U. S. C. § 32705 (a)(2)] sic.” Here, on the face of the text, Defendant fails to distinguish MVICSA from one of its provisions. All citations in Plaintiff’s Brief at pages 17 and page 19 show that different jurisdictions including our State Court, and the Federal 11th Circuit Court etc. interpreted 49 U. S. C. § 32710 as it was written. In deed, the subtitle C 2 of Plaintiff’s Brief at pages iii and 18 states “Uncontested or

Incontestable Evidence Show the Dealer Violated MVICSA with Intent to Defraud.” Plaintiff believes that she has a similar or stronger case than Owens v. Samkle Automotive Inc 1318, 1321 n.4; 425 F. 3d 4 (11th Cir. 2005), which both Defendant and Plaintiff cited and relied on. In Owens, the court concluded that, a dealer violated MVICSA, when using its own title transfer procedure to conceal the car history. In that case, the dealer did not show the original title to a customer, but it did let her sign a power of attorney at sale, that court, at p. 1321 n.4, explicitly disagrees with an interpretation of MVICSA from the Federal 7th Circuit Court, which was assessed as applying a standard of “intent to defraud with respect to mileage;” and the court, at p 1324, agrees the opinion in Yazzie v. Amigo Chevrolet Inc., 189 F. Supp. 2d 1245, 1248-49 (D. N. M. 2001). As this Court can see, the Defendant in the instant case did not even have a title at the time of the sale, and the subject car stalled at highway speed when Plaintiff drove it to-and-from work for the first time. Here, in Defendant’s Brief, it claims that the “intent-to-defraud” standard governs the issue. But it actually misled this Court to apply a standard of “intent to defraud with respect to mileage.” Even so, Plaintiff’s position is that she should prevail also, no matter what standard of the two is adopted, because even as of this day, Defendant failed to produce a copy of the original title, and it fraudulently argued only “six-mile discrepancy” occurred, nine months after a trial. Further, Defendant produced two self-negating Odometer Disclosure Statement forms (S 36, S 37). Without question, an odometer of a car cannot run backwards as the Dealer suggested, as such, the readings and/or

the dates on those forms must be falsified. This alone will beat any of the Dealer's arguments.

(2) As to the review on other Counts, Plaintiff believes that the decision in the Order is inconsistent with other authorities. **On Count 1**, this Court correctly noticed two copies of a "Buyer's Guide" were admitted into evidence at trial. (Order at page 20). But those copies are two versions of a "Buyer's Guide" with different contents. One of them must be fabricated. And in reality Defendant created more than two versions of a Buyer's Guide for a single used car. According to Currie v. Spencer, 772 S. W. 2d 309, 310-311 (Ark. 1989), it is a per se violation of the Magnuson-Moss Act, when a dealer failed to display a Buyer's Guide. **On Counts V and VI**, Plaintiff had a similar but stronger case than Miller v. William Chevrolet/Geo, Inc. 326 Ill. 3d 642, 655; 762 N. E. 2d 1 (1st Dist. 2001); In Miller, a car dealer stated that the car was "executive driven" while it was not, unlike the instant case, no safety issue was involved there, the court provides that "used car dealerships have reason to know that the history of a car is of concern to purchasers." And in Williams v. Bruno Appliance & Furniture Mart, Inc., 62 Ill. App. 3d 219, 222, 379 N. E. 2d 52, 54 (1st Dist, 1978), the court states that under ICFA even the "unthinking, the ignorant and credulous" are protected from deceptive conduct.

III. Plaintiff/Appellant's Comments on the Record

On December 1, 2006 Judge Rhine presided the trial, the day before he retired. The instant appeal was filed on January 5, 2007. After half-a-year search, the Clerk Office in the Circuit Court of Cook County still could not locate more than

half of the documents filed in this case. The situation became worse when one Defendant's motion was duplicated and scattered everywhere in the record, which was not in chronicle order (A 147-150). In the meantime, Defendant vigorously argued that the trial court had no jurisdiction to certify a Bystander's Report. Further, Plaintiff submitted a supplemental record in chronicle order, but on July 30, 2007, when the record was due, at Plaintiff's surprise, the record was also messed up (A 151-154), and the Deputy Clerk, showing a fax from Defendant, stated that Defendant failed to file its documents on time, there was no time for her and her staff to include some of Plaintiff's documents which were already submitted, and no time to reorganize all the files. (Plaintiff's motion to Strike Defendant's Bystander's Report taken with this case). Plaintiff really appreciates the time-consuming effort from this Court, and she firmly believes that it is unfair for her to go through the frustrating process and, as a result, she was prejudiced.

IV. Conclusion

For the foregoing reasons, Yuling Zhan, Plaintiff/Appellant, respectfully requests that this Court grant her petition for rehearing.

Date: _____

Respectfully submitted.

Signature of Yuling Zhan

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