IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA

SUIT NO: CV/942/2019

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN

1. **MR. RILWAN HASSAN**
2. **MR. ABDULAZEEZ HASSAN** } _____ **CLAIMANTS**

AND

COSCHARIS MOTORS LIMITED _____ **DEFENDANT**

JUDGMENT

By the writ of summons filed by the claimants with No. W/942/2019 whereupon the claimants seek for the following reliefs:

1. A declaration that the defendant was negligent and in breach of the duty of care in relation, to handling of the plaintiffs' Fond Focus 2014 Model with Registration Number KUJ 567 TI.
2. An order directing the defendant to return the plaintiffs' Ford Focus 2014 Model with Registration Number KUJ 567 TI in the same condition it was handed over to the defendant on the 5th day of September, 2018.

Or in the alternative:

3. An order directing the defendant to give the plaintiffs the sum of N9,500,000.00 (Nine Million, Five Hundred Thousand Naira) being the current market value of a Ford Focus 2014 Model.
4. Special damages against the defendant to the tune of N5,000,000.00 (Five Million Naira) for the inconveniences and unwarranted and avoidable expenses caused the plaintiffs by the negligent act of handling the plaintiffs' car.
5. General damages against the defendant to the tune of N5,000,000.00 (Five Million Naira) for the embarrassment, caused the plaintiffs by the inability of the defendant to fix the plaintiffs' car.
6. Exemplary damages against the defendant to the tune of N5,000,000.00 (Five Million Naira).
7. Interest on the judgment sum at the conservative rate of 28% per annum from the date of judgment until final liquidation of the judgment.
8. Such further reliefs as this Honourable Court may deem fit to make in the circumstances of this case.

The writ was filed along with the statement of claim of twenty-seven paragraphs, witness's statement on oath, and the documents they intend to rely on at the trial.

The defendant filed its statement of defence accompanied by a witness statement on oath and some documents to which it intend to rely at the trial.

The claimants also filed a reply to statement of defence accompanied by additional witness statement on oath.

The claimants, in the course of the trial presented two witnesses to which they adopted their witness statements on oath and the following documents were tendered in evidence:

a. Printed copy of text message dated the 4th day of September, marked as EXH. 'A1';
b. A letter written by the solicitor of the claimant to the defendant, marked as EXH. 'A2';
c. A letter written by the solicitor of the defendant in reply to the claimants' letter, marked as EXH. 'A3'.
d. A letter written by the solicitor of the claimants to the defendant, marked as EXH. 'A4';
e. A letter written by the defendant to the claimant in reply to EXH. 'A4', marked as EXH. 'A5';
f. A letter written by claimants to the defendant, marked as EXH. 'A6'.
g. Uber text messages, marked as EXH. 'A7';
h. The remaining documents are admitted in bulk, marked as EXH. 'A8'.

The defendant too, in the course of the trial, tendered the following documents:

a. The estimate for Ford Focus addressed to the PW1, marked as DI;
b. The invoice in the sum of N4,000,000.00, marked as EXH. 'D2';
c. The invoice in the sum of N10,400.00, marked as EXH. 'D3';
d. Job Order, marked as EXH. 'D4'.

The witnesses to both parties were crossed examined by their respective counsel and at the close of trial, the counsel to both parties proffered final written addresses and adopted same.

The statement of claim covers pages 10 to 13 where in the claimants averred that they jointly bought the aforementioned vehicle from the defendant and have been enjoying it for their business and personal use without any major challenge until the 4th day of September, 2018 when they received a message via SMS from the defendant that Ford was providing their Ford Focus with both a software update and a no-charge extended coverage of the Transmission Control Module (TCM), and that they should called Bridget with a particulars phone number 08126195165 and request a service date for software update programme 15B22.

It is averred that the claimants sent down the vehicle in issue to enable the defendant carry out the update and this the defendant did not communicate to them until when they called across to the defendant to ascertain what the challenge was. That the defendant informed the claimants on the 7th November, 2018 that their vehicle can neither move forward nor backwards as the Auto Trans Assy, Oil-Automatic Transmission and Anti-free had issues and needed to be replaced, and that the claimants were to pay the sum of N2,698,324.15 in order to get the said fault fixed, while the said vehicle was hitherto in good condition before they were called for a system upgrade and was driven to the defendant's office and that whatever issue the vehicle developed was as a result of negligent handling of the vehicle by the defendant.

It is averred that the claimant wrote to the defendant through their solicitor that the vehicle be returned in good condition within seven days, and the defendant replied stating inter alia that it was during the said upgrade that other faults were observed like transmission control module, brake light shows, transmission fault, and no forward and reverse engagement and offered the claimants a 50% discount to fix the said detects. That there was no such detects as at the time of handing over the

vehicle to the defendant for update and that the detects observed occurred during the period the vehicle was in the defendant's custody and occasioned as a result of negligence, and this was communicated by the defendant and upon doing that the defendant replied that the vehicle would be available for pick up on the 26th November, 2018.

It is averred that the claimants sent their representative on 4th December, 2018 to pick up the vehicle but to their dismay and chagrin, the vehicle refused to move and this was communicated to the defendant.

The claimants also averred that the vehicle in issue is their only vehicle which eases mobility to follow up customers and clients and serving their family needs, and the act of the defendant has deprived the claimants of their lawful use of the vehicle and they have recourse to commercial transport and Uber and taxify their services with the attendant costs and inconveniences. That the defendant has refused to take any concrete steps to alleviate the claimants' position by putting the vehicle in a functional state to serve the purpose for which it was bought.

The statement of claim is the replica of the witness statement on oath.

In the course of cross-examination the PW1 was asked whether he remembered that FSA Transmission Control Module has been carried out on 12th June, 2014, and he answered that he could not remember.

The PW1 was also asked whether their car ought to have been brought for service after 5000 kilometres or six months, and he answered that he knew that he was made to take the car for service at regular interval and which they did until their warranty expired. He was also asked whether by the log book, the last time they brought the car was on 12th July, 2016, and the PW1 told the court that he would not remember the last date, but he was aware that he needs to do routine service on the car and which he was doing as at when due, and he further told the court that he was not under any obligation to service the car in Coscharis.

The PW1 was asked as to the warranty was for how many years, and he answered that he was not aware, and that he remembered that the warranty has expired.

The PW1 was also asked that from 12th July, 2016 when they did the last service to 14th September, 2018 when they brought the car for update to the defendant, the defendant never serviced the car for them, and he answered that he could not remember the last time the car was serviced at Coscharis.

He was asked as to who came to collect the car when they were invited, and the PW1 answered it was the PW2.

The PW1 was asked whether the defendant inform them that it did a work on the car before informing them that the gear box has a problem, and the PW1 answered that they drove the car into the premises and the defendant said that they checked the car. He was also asked that when the representative of the defendant checked the car what happened, and the PW1 answered that the representative of the defendant called to say that Auto transmission has a problem, and he then asked for more explanation and he was told that it works with TCM (Transmission Control Module, which is an electronic component and the Assy is mechanical, and they work together.

The PW1 was asked whether he was told that the representative of the defendant worked on the car apart from diagnosing it, and the PW1 said that he did not know how they arrive at their conclusion.

The PW1 was asked whether he drove the vehicle into the workshop where the defendant was to work, and he answered that as a policy, the defendant has a receiving point, and a person is not allowed to enter into the workshop and that the claimant's driver drove the car to the receiving point and handed it to the representative of the defendant who then drove it in.

When the PW1 was asked to tell the court the distance from the receiving point and the workshop, the PW1 told the court that he did not have an idea. He was also asked whether when they were asked to come and pick the car, did any of the staff of the

defendant carry the car, and the PW1 answered that nobody took the car as it could not move.

The PW1 was also asked whether it was the same day his driver brought the car to the receiving point and it was taken to the workshop was the same day that they were told that the car has a problem, the PW1 told the court that he would not remember but it was not the same day. The PW1 was asked to look at EXH. 'A1' wherein they were asked to come and be given a date when they would bring the car for upgrade, that what was the date given to them, and the PW1answered that he could not remember the date, but he took the car on the date it was agreed.

The PW1 was asked to look at EXH. 'A3' and 'A5' and to tell the court where the defendant admitted liability, and the PW1 answered that he didn't see where the defendant admitted liability. He was also asked to look at EXH. 'A6', the last paragraph of page 1 and was asked whether he complied with that letter, and the PW1 told the court that he complied through his representative.

The PW1 was asked as to how many cars do they have, and he answered that as at the time he was giving the evidence, they have only one car, but as at 2018 they did not have any car beside the vehicle in question Ford.

The PW2 also in the course of cross-examination was asked as to who instructed him to take the car to the defendant's workshop, and he answered that it was Hassan Rilwan. He was also asked that in paragraph 7 of his witness statement on oath, he stated that the car in question was always been serviced without any problem, and it was the defendant that service the car because the car was bough from the defendant, and he answered in the affirmative. He was also asked when he service the car he keeps a log book, whether he can tender the log book kept which was serviced by a different company, and the PW2 answered that no any company that serviced the car apart from the defendant.

The PW2 was asked that his bosses own Pocal Point Laundry Litd and Sarduna Magazine, and he answered in the affirmative, and in another question whether Pocal Point laundry and Sarduna Magazine own by Rilwan Khadiya and Abdulazeez, the PW2 said he did not know.

He was asked as to how many cars the company has, and he answered that the company has many cars.

The PW2 was asked that as at 2018, how many cars the company has, and the PW2 answered that the company had five cars. He was also asked whether the FSA in that car was carried out on the 12th June, 2016, and the PW2 said that he did not know. He was also asked whether he drove the car to the defendant and the car was taken to the garage, and the PW2 answered that he parked the car at parking lot and handed over the key and went away.

The DW1 in the course of cross-examination told the court that he was not there at the time the representative of the claimant brought the car in question, and he was not aware that the car was driven to the workshop.

The DW1 was asked as to how many days interval between the date the car was brought to the workshop and when the car was diagnosed, and the DW1 answered that it was on scheduled appointment on that day and they gave priority to those on appointment. He was also asked as to how many days interval the car was diagnosed, and he answered that it took three days after the car was received. He was also asked whether the car was moved from where it was parked, and he answered that the vehicle was not able to move from where it was parked.

The DW1 was asked whether they informed the claimant to bring the car for a software update, whether that was the reason it was taken to workshop, and the DW1 said that software update was done in July, 2016 at bout 64,228km.

When it was put to the DW1 whether it was based upon that SMS that the claimant brought his vehicle to the workshop, and he answered that they did not know when the claimant received his SMS, but the upgrade was already done in July, 2016. He was

also asked that as the defendant noticed that the claimant's gear box was faulty, the defendant offered 50% discount for the gear box, and the DW1 answered that the manufacturer approved 50% as a goodwill gesture and that was why they submitted the estimate they tendered as exhibit.

The DW1 was asked that in their letter of 25th November, 2018, they wrote to the claimant that the car was in good condition as it were because it was delivered to you for upgrade and after that the claimant come back to collect the car, and the DW1 answered the claimant's representative was invited to come with a view to confirm the true condition of the car as at the time it was brought and that as at the time he dropped the car, it was not tested.

The DW1 was asked to look at EXH. 'A5' line 4, and he answered that he knew that the driver was invited to come so that to ascertain the true condition of the car. He was also asked that on the 25th November, 2018 and based upon the directive in the letter, the driver came to pick the car and it did not move, whether it is true or false, and the DW1 answered that the vehicle could not move as the problem has not been fixed, and that the car is still in the garage of the defendant.

In his written address, the counsel to the defendant formulated four issues for determination, to wit:

1. **Whether the defendant was negligent in handling the car of the plaintiffs which was brought into the workshop of the defendant for Transmission Control Module (TCM) upgrade?**
2. **Whether the plaintiffs have made out any case entitling them to claim any form of damages from the defendant?**
3. **Whether the plaintiffs made out a case entitling them to the sum of Nine Million, Five Hundred Thousand Naira (N9,500,000.00) being the current market value of a Ford Focus 2014 Model?**

4. Whether the plaintiff is entitled to 28% per annum in the judgment sum from the date of judgment till the final liquidation of the judgment sum?

On the issue No. 1, the counsel submitted that the plaintiffs in all their processes filed in court and in all the oral evidence given in this court did not lead any evidence of the particulars of negligence that that claim is predicated upon and without prove of particulars of negligence the plaintiffs will not be entitled to anything and he referred to the case of **A.N.T.S. V. Atoloye (1993) 6 NWLR (pt 298) 233 at 246-247, paras. F-B** to the effect that the plaintiff must prove with preponderance of evidence and on balance of probabilities that the defendant owed him a legal duty of care, that the duty was breached and that he suffered damages arising from the breach the counsel also cited the cases of **A.G. Leventis (Nig.) Plc V. Akpu (2007) 17 NWLR (pt 1063) 416 at 435-436, paras. C-B; UBA Plc V. Ayinke (2000) 7 NWLR (pt 663) 83 at 102, paragraphs C-D; and UBN (Nig.) Plc V. Emole (2007) 8 NWLR (pt 745) 501 at 517-518 paras. H-A,** all to the effect that the plaintiff must to provide particulars of the negligence, and in the instant case, to him, the plaintiffs failed to provide particulars or negligence on the part of the defendant.

The counsel submitted that from the state of affairs it can be deduced that it does not disclose any breach of a duty of care owed the plaintiff by the defendant and that the plaintiff did not lead any evidence that will compel this court to grant prayer one and the heard of the claim must fail, and he cited the case of **Etim V. Akpas (2019) 4 NWLR (pt 1654) 451 at 467, paras. B-D** to the effect that the first relief sought being declaratory, the plaintiff must succeed on the strength of his own case and not on the weakness of the case proffered in defence to the claim, and he submitted that the plaintiffs have not made out a case for which this court can make a declaration the plaintiffs are seeking, and the counsel urged the court to refuse reliefs Nos. 1 and 3 as stated in the statement of claim.

The counsel argued that the PW1 tendered EXH. 7 to show that he was using taxis during the period the car was at the

workshop of the defendant, but that under cross-examination, both the PW1 and PW2 confirmed that they had about nine cars as at 2018, and their piece of evidence, the counsel submitted, puts a lie the claim of the PW1 that they were using public transport and he argued that this is how to reconcile and urged the court to conclude that the plaintiffs never took public transport as they had other cars to use in place of the defendant.

The counsel submitted that the PW1 stated under cross-examination that when he stopped servicing the car at another workshop, but the PW2 stated that he is the driver of the car and that they never serviced the car at any other workshop expect the workshop of the defendant. He argued that this contradictory evidence of both the PW1 and PW2 confirms the evidence of the DW1 that the car had not been service since 12th June, 2016 until the 13th September, 2018 when the PW1 brought the car under the disguise that he wants to the Transmission Control Module (TCM) upgrade knowing fully well that the car was in bad condition.

The counsel submitted that assuming without conceding that the car got bad under the defendant, the plaintiff are under a legal obligation to instigate their loss instead of allowing the loss to continue running so that the defendant will be made to bear the cost of the loss, and he cited the case of **Udeagu V. Benue Cement Co. Plc (2006) 2 NWLR (pt 965) 600 at 621, paras. C-E** and submitted that since the plaintiffs had other cars, they could have used those cars if the use of the subject car has become impossible and not to resort to public transport to the extent of claiming N5,000,000.00 as cost of the transportation, and he urged the court to refused relief No. 1 as same amounts to sold digging.

On the issue No. 2, the counsel submitted that the plaintiffs have not proved the claim of special damages, exemplary, general damages and he cited the case of **Arison Trading & Engineering Co. Ltd V. The Military Governor of Ogun State (2009) 15 NWLR (pt 1163) 26 at 51-52, paras. G-B** to the effect that specials damages must be proved to the hilt and the counsel

argued that the receipts tendered by the PW1 has nothing to do with the fact that the car is at the workshop of the defendant, and that the PW1 had a duty to mitigate his loss, if any, which he did not do so, and therefore urged the court to refuse the claim for special damages.

The counsel submitted that the plaintiffs are not entitled to general damages, and he cited the case of **Smithkline Beecham Plc V. Formex Ltd (2010) 1 NWLR (pt 1175) 285 at 306, paras. C-D** and submitted that the claim for general damages by the plaintiffs is speculative and based on scanty evidence, and that there is no prove that the defendant did anything to the car to spoil the gear box. He submitted that the PW1 is only angry that the defendant got a 50 percent discount for them from the manufacturers of the car and forgetting that 50 percent discount and that the defendant must adjudged liable to the plaintiffs and it is the duty of the plaintiffs to prove that the defendant did something wrong, and he submitted that the plaintiffs have failed to prove their entitlement to general damages and he urged the court to so hold, and he cited the case of **Alele Williams V. Sagay (1995) 5 NWLR (pt 396) 441 at 445, paras. A-D** to the effect that the case of the plaintiffs does not fit into the circumstances in which exemplary damages can be awarded, and urged the court to hold that the defendant has not done anything so outrageous that will make it award exemplary damages against the defendant.

On the issue No. 3, the counsel submitted that the plaintiffs led no evidence to prove that the current market value of Ford Focus 2014 is N9,500,000.00, and having not led evidence the court cannot make the order the plaintiffs are praying for. He argued that the plaintiffs have not led evidence that they are entitled to Ford Focus 2014 model or the current market value of the car, having bought the car in 2014, and urged the court to refuse this relief.

On the issue No. 4, the counsel submitted that award of post sum is dependent on the party getting judgment in his favour, and the Rules of the court provides for 10 percent post judgment

interest, and that the plaintiffs have not given reasons as to why they should have 78% post judgment interest and is therefore untenantable and should be refused.

In his final written address, the counsel to the plaintiffs raised two issues for determination, thus:

1. **Whether the defendant was negligent and breached the duty of care owed the claimants in their handling of the Ford Focus 2014 Model with registration number KUJ 567 TK?**
2. **Whether considering the facts and materials before this Honourable Court, the claimants have successfully proved that case on preponderance of evidence entitling them to the reliefs sought as per their wit of summons and statement of claim?**

On the issue No. 1, the counsel to the claimant submitted that the claimants bought the vehicle from the defendant and were enjoying the use before they received an information to bring the vehicle for upgrade and acted upon same without objection from the defendant and never refused to accept the vehicle from the claimants. He submitted further that the defendant never informed the claimants that the vehicle was brought to them with defect, and that no reference was made in all the correspondences leading to this suit, and only for the defendant to raise it as a defence for the first time, and he urged the court to so hold.

The counsel cited the case of **Kaltor Ventures Limited V. Total Nigeria Limited (2021) 41 WRN 98 at 119 where negligence was defined and that the court went further and held that in an action raised in negligence, a claimant must establish the following:**

a. **That the defendant owes him a duty of care;**
b. **That there is a breach of such duty of care; and**
c. **That he suffered damages as a result of the defendant's failure or breach of that duty of care,**

and he also cited the case of **Hamza V. Kure (2010) 10 NWLR (pt 1203) 630,** and further submitted that the claimants have been able to prove the above elements.

The counsel submitted that the facts and particulars of negligence were copiously pleaded in paragraphs 13 and 14 of the statement of claim and paragraphs 15 & 16 of the claimants' witness statement on oath, and urged the court to so hold. He submitted that facts admitted need no further proof, and referred to the case of **N.A.S.Ltd & Anor. V. U.B.A. Plc & Anor (2021) 10 WRN 165 at 177.**

The counsel submitted that by EXH. 'A3' the defendant admitted in paragraph 2 that it was during the software update that some faults were observed, and he argued that by the above statement, it can be inferred that the vehicle was brought for an update and the update was indeed carried out, and that it was during the update that some faults were detected in a vehicle which was hitherto in good condition. The counsel further referred to EXH. 'A5' where the defendant stated that the car is in good condition as it were before it was delivered to the defendant for upgrade, and according to the counsel the defendant's assessment, the car was in good condition as at when it was brought for upgrade, and he cited the case of **Lawal V. Amusa (2009) All FWLR (pt 485) 1811 at 1820, paras. C-E,** to the effect that facts admitted in a pleading need no further proof. The counsel referred to paragraph 17 of the defendant's statement of defence and paragraph 19 of the defendant's witness statement on oath wherein the defendant admitted not knowing the condition of the car when it was brought to the defendant, and to him, this is clearly an admission of negligence, and he buttressed this with the case of **Iyere V. Bendel and Flour Mill Ltd. (2009) All FWLR (pt 453) 1217 at 1232, para. E.**

On the issue No. 2, the counsel cited the case of **Fagbuaro & Ors. V. Alabi & Ors (2020) 12 WRN 120 at 130 and Ali & Anor V. Bala & Ors (2020) 22 WRN 102 at 126** on the evidential burden of proof is on the party who alleges a fact and is generally on the claimant, and submitted that the claimants have led cogent and

unassailable evidence on proof of their case of breach of duty of care against the defendant.

The counsel submitted that upon the shift of the burden of proof to the defendant, the defendant has been able to put up that the SMS was not meant to be sent to the claimants, but same was not communicated to the claimants when the vehicle was brought for upgrade, and the defendant still went ahead with the upgrade. That the claimants have not been bringing the vehicle for servicing after six months or 5000km, and document was brought to buttress this fact and same was denied under cross-examination, and service renders to change of engine oil and does not extend to gear box. That the claimant earlier bought a BMW 3 series before the vehicle in question. That the claimants are directors in Sarduna Magazine and Focal Point Laundry Services and both outfits have cars, and submitted that the companies and their directors are two distinct entities. That the name of the owner of Ford Focus 2014 Model in their record is the 2nd claimant who did not come to testify personally, and the counsel submitted that these contentions are of no moment, and he referred to the case of **Erebor & Anor. V. Eremah & Anor. 92020) 36 WRN 88 at 129 to the effect that a party, whether a claimant or a defendant needs not present himself physically.**

The counsel cited the case of **Okoro V. Okoro (2011) All FWLR (pt 572) 1749 at 1878, paras. B-D** to the effect that it is the duty of the trial court to evaluate the totality of the evidence of the parties, and the counsel submitted that the claimants have been able to discharge the onus of proof required, and there is little or nothing on the part of the defendant to sway the mind of the court and urged the court to so hold.

The counsel submitted that the claimants pleaded the damages suffered by them due to the action of the defendant showing that unwarranted and avoidable expenses that the defendant's action caused the claimants, and that the claimants are entitled to special damages and urged the court to so hold, and he cited the case of **Erebor & Anor. V. Eremah & Anor (supra).**

The counsel submitted that having proved negligence and breach of duty of care, general damages aimed at restituting the claimants for their pain and suffering occasioned them for their inability to use their car ought to be granted and urged the court to so hold, and he cited the cases of **Iyere V. Bendel Feed & flour Mills Ltd (supra); Erebor & Anor V. Eremah & Anor (supra); and Anowu V. Ulu & Anor (2020) 51 WRN 49 at 65.**

The counsel submitted that by the Rules of the court, a party is entitled to post judgment interest and urged the court to so hold that claimants are entitled to interest on the judgment sum.

The counsel to the defendant filed a reply on points of law to the claimants' final written address and submitted that the first relief sought by the claimants is declaratory in nature and therefore it is the duty of the claimants to prove their entitlement but they failed to do that, and he cited the case of **Adedeji V. Bello (2015) 6 NWLR (pt 1454) 104 at 131, paras. C-E** to the effect, that the court cannot grant a declaratory relief on admission. He submitted that the claimants have not told this court that the defendant's negligence or breach of duty or care owed to them, if any, and that the problems can be gleaned from the fact that the subject car was not serviced for over two years before it was brought into the workshop of the defendant.

The counsel submitted in his reply on points of law that the PW2 said he brought the car to the defendant's workshop what he handed over to staff of the defendant was the car key and not the car itself, and there was no way any staff of the defendant could have known the state of the car until they wanted to drive it, and he cited the case of **Amobi V. Agudi Union Nigeria (2023) 1 NWLR (pt 1864) 153** to the effect that a claimant must prove to the satisfaction of the court that he is entitled to the declaratory relief sought.

The counsel submitted that the claimants did not call Bridget and so they did not get the service date and they drove the car into the workshop hoping to pass their liability to the defendants, so the claimants did not comply with the terms of the offer because had they called Bridget as requested in the text

message they would have find out that the upgrade had been done on the car earlier.

The counsel submitted that the car was put in the condition it was when it was brought in, meaning that the car's gear box could not engage backwards or forward as it was when the car was brought into the workshop.

It is also submitted that the total amount in EXH. A7 is N93,000.00 and even if the court believes that the receipts are genuine, the court cannot award N5,000,000.00 when the receipts only show the sum of N93,000.00.

The counsel submitted that allegation of crime against the defendant by the counsel to the claimants in his final written address has to be proved beyond reasonable doubt and he cited the case of **Chiokwe V. State (2013) 5 NWLR (pt 134) 205 at 227 para. D** to the effect that submission of counsel cannot take the place of evidence. The counsel then urged the court to dismiss this suit with substantial cost for being frivolous and a gold-digging venture.

Now, it is incumbent upon this court to evaluate the evidence of both parties with a view ascribe probate value to the one that is credible. See the case of **Iloputaife V. Orji (2021) All FWLR (pt 1114) 1 SC.**

In the course of cross-examination, PW1 told the court that the representative of the defendant called to say that auto transmission Asy has a problem, and he then asked for more explanation, and he was told that it works with TCM (Transmission Control Module), which is an electronic component and the Asy is mechanical, and they work together. He further told the court during cross-examination that he did not know how the defendant arrived at their conclusion whether the defendant worked on the car apart from diagnosing it.

Moreso, even though he testified that the claimants' driver drove the car to the receiving point and the representative of the defendant drove it into the workshop, and he has no idea as to the distance from the receiving point to the workshop. He was asked as to whether any of the staff of the defendant carry the

car, and the PW1 answered that nobody took the car as it could not move.

The PW1 also told the court that he would not remember whether it was the same day the car was brought and that was the day they were told that the car has a problem, but it was not the day.

Thus, by the answers given by the PW1, it could be inferred that the PW1 was lacking knowledge of the facts to which he testified, and that he could not be able to recall the events accurately, and therefore, these pieces of evidence are not worthy of believe.

The PW1 was asked to look at EXH. 'A1' wherein they were asked to come and be given as to when they would bring the car for upgrade, and was also asked what was the date given to them, and the PW1 answered that he could not remember the date, but he took the car on the date it was agreed. The PW1 did not go further to state the date that was agreed, and with whom was he agreed with. Looking at EXH. 'A1' which is a text message sent by the defendant and the message read:

> Mon, Sept. 10
>
> Dear sir/madam,
> Ford is providing your Ford Focus with both a software update and a no-charge extended coverage for your Transmission Control Module (TCM) Bridget; 08126195165 and request a service date for software update programme 15B22. This update or replacement of TCM is free.
>
> Thu, Oct 4
>
> Dear Customer,
> Ford is providing your Ford Focus with a no-charge extended coverage for you Transmission Control Module (TCM) update and Transmission Clutch Shudder repair.

Please call without delay Bridget (08126195165) and

Fri Oct 26,

I just confirmed that the manufacturer ask for pix of gear box showing serial number and model number which will be done and will revert by Monday.

Tue, Nov. 6

Please I have asked Emeka to get update and call you please.

Name: Festus Onyeriks GM

Abuja Tel: 08023137456.

From the content of EXH. 'A1', it can be inferred that the defendant sent a text message to the claimants informing them of the update it would provide at no-charge for Transmission Control Module (TCM), and the claimants were asked to call Bridget. The PW1 did not say he has called Bridget, and the conversation of Friday, the October, 4 did not indicate who issued such statement of confirming that the manufacturer ask for pix of gear box showing serial and model numbers, and it can also be inferred that the claimants did not contact Bridget, and therefore, the PW1 apart from being evasive or lacks knowledge of the facts, also did not show the claimants did what were asked to do by the defendant, and therefore the evidence lacks probative value.

The PW1 was asked to look at EXH. 'A3' and 'A5' and to show where the defendant admitted liability, and the PW1 told the court that he did not see where the defendant admitted liability, and he also told the court that he complied with the letter EXH. 'A6', and he answered that he complied through his representative.

The PW1 was asked whether he could remember that FSA Transmission Control Module has been carried out already on 12th June, 2014, and the PW1 told the court that he could not remember. He was also asked whether by the Log Book the last time they brought the car for service was on the 12th July, 2016,

and the PW1 told the court that he was not aware the warranty was for how many years.

The PW1 was also asked from 12th July, 2016, when they did the last service to the 14th September, 2018 when they brought the car for update to the defendant, that in between that period the defendant did not service the car for them, and the PW1 answered that he could not remember the last time the car was service by the defendant. By the above pieces of evidence, the PW1 kept on saying he was not aware, and therefore, I hold the view that the witness lacks knowledge of material facts and he is not worthy of belief.

The PW1 was asked whether the car ought to have been brought for service after 5000 kilometers or six months, and he answered that he knew that he was made to take the car for service at regular interval and which they did until their warranty expired, and he further told the court that he was not under any obligation to service the car at the defendant's workshop. However, the PW2 told the court during cross-examination, that the car in question was always been serviced without any problem, and that no any company that serviced the car apart from the defendant.

Thus, the PW2 has contradicted what the PW1 has stated earlier that they stopped servicing their car with the defendant, and this tradition is material in ascertaining whether there was contributory negligence on the part of the claimants.

The PW1 and PW2 did not state in their evidence that they were there when the defendant drove the car from the receiving point to the garage, they did not state that by their finding that the car was working by the defendant rather they were informed by the defendant that the car could not move either backward or forward. What is germen in this suit is:

> **Who caused the vehicle not to move? Was it the defendant? Or that already before the car has problem before it was taken to the defendant?**

The PW1 and the PW2 testified to the fact only that they took the car to the defendant and parked at the receiving point,

however, they have not said that they were there when the car was moved from the receiving point to the workshop, and they did not say that the car was worked by the defendant.

The DW1 told the court during cross-examination that he was not aware that the car was driven to the workshop, and that from the day that the car was brought to the defendant to the day it was diagnosed was three days interval, and that the car was not able to move from where it was parked.

The DW1 also told the court that the defendant noticed that the gear box was faulty, the Manufacturer offered 50% discount as a good will gesture.

The DW1 was referred to a letter of 25th November, 2018 where the defendant wrote to the claimant that the car was good condition as it were and after the claimant come back to collect the car, and the DW1 told the court that claimant was invited with a view to come to confirm the true condition of the car as at the time it was brought as it was not tested.

The letter of 26th November, 2018 written by the defendant to the solicitor of the claimant line 4 reads:

> **In line with your request in the referenced letter we put the car in order and please inform your clients to come for their car on Wednesday 28th November, 2018. The car is in good condition as it were before it was delivered to us for upgrade.**

The DW1 was further asked that on the 25th November, 2018 and based upon the directive in EXH. 'A5' (just written above) the driver came to pick the car and it did not move, and the DW1 answered that the car did not move as the problem has not been fixed.

The evidence of the DW1 and the content of the letter, more especially line 4 may look contradictory, however, going further to line 5 where it reads:

> **However let your client know that neither Ford nor Coscharis Motors Limited shall be liable for any liability arising later on the transmission as we have already seen an existing fault and would have loved to correct it**

for your clients at 50% goodwill which your client declined.

Looking at the above paragraph 5 of the letter of 26th November, 2018, it can be inferred that the defendant stated that the defendant shall not be liable for any liability arising later on transmission as it has already seen an existing fault. To my mind, and existing fault is the faulty gear box, so putting paragraphs 4 and 5 of the letter of 26th November, 2018, side by side, it can be inferred that reference to putting the car in order was in respect of the upgrade, while the faulty gear box was not addressed. Therefore, to my mind, there is no material contradiction as to the evidence of the DW1 and the content of the letter, and to this I so hold.

In the circumstances, putting the evidence of the claimants and that of the defendant on the scale, I am of the opinion that the pieces evidence of the claimants are not worthy of belief, and the evidence of the defendant is more preferred.

The claimants wrote a letter through their solicitor which is marked as EXH. 'A2' demanding for the production of the car in issue, and the claimant alluded to the fact that it was the defendant might have noticed the problem of Auto Trans Assy, Oil-Automatic Transmission and Anti-Freeze, the defendant in EXH. 'A3' replied the claimants that some faults were observed like transmission module and faulty gear box when the car was diagnosed, and that the manufacturer had offered 50% discount on the price of the gear box of N1, 349,162.08. By this, it does not mean that the defendant had admitted to the claim of the faulty gear box, and to this, I so hold.

Thus, the issue of negligence is a matter of fact to be proved. See the case of **F.A.A.N. V. W.E.S. (Nig.) Ltd (2011) All FWLR (pt 574) p. 48 at 69, para. B.** therefore, the claimants have the burden to prove and establish the ingredients of negligence, thus:

a. That the defendant owed the plaintiff a duty of care.
b. That the defendant failed to exercise that duty of care, and

c. That the defendant's failure occasioned the damage or loss suffered by the plaintiff.

See the case of **F.A.A.N.V. W.E.S. (Nig.) Ltd (supra).**

It was held by the Court of Appeal, Lagos Division in the case of **A.M.C. (Nig.) Ltd V. Volkswagen of (Nig.) Ltd (2011) All FWLR (pt 588) p. 931 at 945, paras. A-C** that where plaintiff pleads and relies on negligence by conduct or action of the defendant, he or she must prove by evidence the conduct or action and the circumstances giving rise to the breach of the duty of care. He must plead all the particular in sufficient detail of the negligence alleged and the duty of care owed by the defendant and must be established. In the instant case, the claimant did not give evidence as to the action or conduct of the defendant that caused the negligence as no particulars were given, rather the claimant relied on the information given by the defendant that the car was diagnosed and existing gear box fault was discovered as the car could not move. It is the law that the claimants must give particulars of the items of negligence relied on as well as the duty of care owed him by the defendant. See the case of **Kaltor V. Entures Ltd V. Total (Nig.) Plc. (2021) All FWLR (pt 1104) p. 408 at pp. 428 – 429, paras. G-B.**

It is not enough to prove damage or that the claimant suffered damage without corresponding duty of care and its breach on the part of the defendant. See the case of **Ogbiri V. N.A.O.C. Ltd (2011) All FWLR (pt 577) p. 813 at 820, paras. A-C.**

It was also held in the same case of **Ogbiri V. N.A.O.C. Ltd (supra) at pp.820 – 821, paras. F-B** that the particulars of negligence are intended to appraise the defendant of what he did, or failed to do, in breach of his duty of care to the plaintiff and to demonstrate that a reasonable person in his position ought not to have committed the breach. Fortressing of particulars of negligence is mandatory. In the instant case, the claimants have not established what the defendant did or fail to do, as it is not established by evidence what the defendant did or failed to do.

It is also the law that pleadings are not evidence and so even if the claimants plead particulars, the pieces of evidence are short of the particulars of negligence. To my mind, the claimants have not been able to prove that there was negligence and therefore, one of the ingredients has not been proved, and the claims of the claimants failed and the action is hereby dismissed.

Hon. Judge
Signed
30/1/2024.

Appearances:

A.A. Sadiq Esq appeared with A.I. Idowu Esq for the claimants.