

1975

John Christopher and Ruth Christopher v. Larson Ford Sales Inc., Ford Marketing Corporation, and Murray First Thrift and Loan Company; Larson Ford Sales, Inc.; Condor Coach Corporation : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Christopher v. Larson Ford Sales*, No. 14063.00 (Utah Supreme Court, 1975).
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UTAH SUPREME COURT

BRIEF

ME COURT E OF UTAH

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JOHN CHRISTOPHER AND RUTH
CHRISTOPHER

Plaintiff-Respondent

vs.

LARSON FORD SALES, INC., FORD
MARKETING CORPORATION, AND
MURRAY FIRST THRIFT AND LOAN
COMPANY

Defendant-Appellant

LARSON FORD SALES, INC.,

Defendant-Third Party
Plaintiff-Appellant

vs.

CONDOR COACH CORPORATION

Third Party Defendant

FILED

MAR 2 1976

14063
Clerk, Supreme Court, Utah

**Appeal from a Dismissal of Third Party Claim and
a Judgment on the Verdict of the Third Judicial
District Court for Salt Lake County, State of Utah
THE HONORABLE BRYANT H. CROFT, Presiding**

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TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT	13
POINT I. IT WAS ERROR FOR THE TRIAL COURT TO SUBMIT THE ISSUE OF MERCHANTABILITY TO THE JURY.	13
POINT II. THE EXPRESS WARRANTIES AS TO THE MOTOR HOME WAS NEVER BREACHED BY DEFENDANT, LARSON FORD SALES, INC.	20
POINT III. THE COURT ERRED IN NOT DISMISSING PLAINTIFFS' WARRANTY CLAIM DUE TO THE PLAINTIFFS' FAILURE TO MEET STATUTORY REQUIREMENTS.	22
POINT IV. NO STANDARD OF MERCHANTABILITY WAS ESTABLISHED AS TO THE MOTOR HOME.	23
POINT V. THE COURT ERRED IN SUBMITTING THE CLAIM OF FRAUD TO THE JURY SINCE THE PLAINTIFF FAILED TO PRODUCE CLEAR AND CONVINCING EVIDENCE.	26
POINT VI. IT WAS ERROR FOR THE TRIAL COURT TO DISMISS THE THIRD PARTY CLAIM OF LARSON AGAINST CONDOR COACH CORPORATION	35
CONCLUSION	42

Cases Cited

Auerbach v. Samuels, 10 U2d 152, 349 P2 1112 (1960)	30 34
Basta v. Riviello, 66 Lach Jun 77 (Lacauanna County Court, Pa 1964)	25
Boeing Aircraft v. O'Malley, 829 F2d 585 (1964)	41
Buehner Block Co., v Nick Glezos, 6 U2d 226, 310 Pd	14

TABLE OF CONTENTS--Continued

	Page
CIT v. Sohm, 15 U2d 262, 391 P2d 293	29, 34
Cheney v. Ruckes, 14 U2d 205, 389 P2d 86 (1963)	14
Childers and Venters, Inc., v. Soward, 460 SU2d 343, (Ky 1970)	20
Chrysler v. Burns, _____ U _____, 527 P2d 655 (1974)	39
Detroit Vapor Stove v. Wheeler, 61 U 503, 215 P2d 995, ALR2d 632 (1923)	28
Ellis v. Hale, 13 U2d 279, 373 P2d 382 (1962)	31, 32
Hayes Merchandise, Inc., v. Dewey, 474 P2d 27 (Wash 1970)	24
Jardine v. Brunswick Corp., 18 U2d 378, 423 P2d 659 (1967)	28
Koellmer v. Chrysler Motor Corp., 6 Conn. Cir. 478, 276 A2d 807 (1970)	41
Landes & Co., v. Fellows, 81 U 432, 19 P2d 89 (1933)	17
Lewis v. White, 2 U2d 101, 269 P2d 865 (1954)	34, 35
Merris v. Russell, 120 U 545, 236 P2d 451 (1951)	14
National Farmers Union Property and Casualty Co., v. Thompson, 4 U2d 713, 286 P2d 249	14
Oberg v. Sanders, 111 U 507, 184 P2d 229	27
Pace v. Parrish, 122 U 144, 247 P2d 273, 54 ALR2d 667 (1952)	33
Pacific Marine Schwabacher, Inc., v. Hydrosift Corp., _____ U2d _____, 525 P2d 615 (1974)	15, 24
Park v. Moorman, 121 U2d 339, 241 P2d 914 (1952)	27
Redman Industries v. Binky, 49 Ala App 595, 274 So2d 621 (1973)	40
Slaughter v. Gerson, 13 Wall, (U.S.) 379, 20 L.Ed. 627, 61 ALR 495 (1872)	33
Thomas v. Caldwell, 27 U2d 423, 497 P2d 31 (1972)	28
Tibbets v. Openshaw, 18 U2d 442, 425 P2d 160 (1967)	19
Tiger Motor v. McMurtry, 224 So2d 630 (Ala 1969)	41
Tracy v. Vinton Motors, 130 Vt 512, 296 A2d 269 (1972)	25
Vernon v. Lake Motors, 26 U2d 269, 488 P2d 302 (1971)	21

TABLE OF CONTENTS--Continued

	Page
Statutes Cited	
70A-1-201 (10) Utah Code Annotated (1953) as amended	41
70A-2-314 Utah Code Annotated (1953) as amended	38
70A-2-316 (2) Utah Code Annotated (1953) as amended 15, 19, 40	40
70A-2-316 (3) Utah Code Annotated (1953) as amended	19
70A-2-508 Utah Code Annotated (1953) as amended	22
70A-2-608 Utah Code Annotated (1953) as amended	22
70A-2-711 Utah Code Annotated (1953) as amended	23
70A-2-714 Utah Code Annotated (1953) as amended	23
Authorities Cited	
3 Benders UCC Services, Sec. 7 at (3)	15
Uniform Laws Annotated, West Publishing Company, Vol. 1, Page 191, Comment 8	38

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN CHRISTOPHER and RUTH)
CHRISTOPHER,)
)
Plaintiffs-Respondents,)

-vs-)

LARSON FORD SALES, INC., FORD)
MARKETING CORPORATION, and)
MURRAY FIRST THRIFT AND LOAN)
COMPANY,)

Defendants-Appellants,)

-vs-)

LARSON FORD SALES, INC.,)
)
Defendant-Third Party)
Plaintiff-Appellant,)

-vs-)

CONDOR COACH CORPORATION,)
)
Third Party Defendant.)

Case No 14063

APPELLANT'S BRIEF

NATURE OF THE CASE

The Complaint of the plaintiff is based upon fraud and
breach of warranty for a particular use regarding the purchase

of a 1970 Condor motor home by the plaintiffs from the defendant, Larson Ford, a motor vehicle dealer, and Ford Marketing Company, the manufacturer of the chassis of said motor home. Larson Ford made a Third Party Claim based on breach of warranty over the third party defendant, Condor Coach Corporation, who manufactured the body upon the Ford Chassis and installed various component parts in the body to allow persons to live and eat in the motor home.

DISPOSITION IN LOWER COURT

The trial court, sitting with a jury, denied a Motion to Dismiss of the defendant, Larson Ford, and granted a Motion to Dismiss of the defendant, Ford Marketing Company, at the end of plaintiffs' evidence, denied a Motion for a Directed Verdict on the part of the defendant, Larson Ford, and granted a Motion to Dismiss defendant's Third Party Complaint by the defendant, Condor Coach Corporation, allowed the case of the plaintiffs against Larson Ford to go to the jury on the theories of breach of warranty merchantability and fraud, upon which the jury found in a general verdict that the plaintiffs were entitled

to rescind the contract and awarded a Judgment for out-of-pocket damages. The trial court also denied a Motion for a New Trial on the defendant's Crossclaim against Condor Coach Corporation, and denied a Motion for Judgment Notwithstanding Verdict as to the jury verdict returned against Larson Ford.

RELIEF SOUGHT ON APPEAL

The defendant, Larson Ford, seeks to reverse the trial court's various denials of Motions to Dismiss the plaintiffs' Complaint, and the denial of the Motion for Judgment Notwithstanding the Verdict of Larson Ford to enter a Judgment of No Cause of Action; or in the alternative, to enter a Judgment against Condor Coach Corporation pursuant to the Third Party Claim, or to Order a new trial upon all of the issues in this case.

STATEMENT OF FACTS

The plaintiffs herein filed a Complaint alleging, among other matters, that the defendants had made the following representations to the plaintiffs:

"(a) That the Condor was a new machine which had been driven only 7,000 miles. In truth and in fact, said machine was a used machine which had been in service for many months and which plaintiffs believe and therefore allege had been driven more than 60,000 miles when they purchased it, and this fact was well known to both Larson Ford Sales, Inc. and Ford Marketing Corporation.

(b) That the condor Motor Home was reasonably fit for the purposes which plaintiffs revealed to Larson Ford Sales, Inc. they intended to put said vehicle, namely for the purpose of transporting people in the Intermountain West where there are numerous steep highways, over mountains, and in addition for the purpose of towing a motor car to be used when the motor home was parked. In truth and in fact, said statement and representation was completely false in that the motor home itself would not reasonably pass over and climb through the mountain roads located in the area where plaintiffs live and the sale was made, but did not have sufficient power and/or drive train strength to carry the motor home itself, let alone tow a motor car.

(c) That the Condor Motor Home was reasonably fit for the purpose intended, namely use by plaintiff and his wife or their family in traveling around over the Intermountain West. In truth and in fact, the motor home's motor and drive train were of insufficient capacity to carry without damage the weight of the motor home and propel the same over the mountain roads in and about Utah and in the Intermountain West where all parties knew plaintiffs intended it to be driven.

(d) Defendants Larson Ford Sales, Inc. and Ford Marketing Corporation warranted the Condor 27 foot Motor Home particularly described to be designed, equipped and reasonably fit for the purpose intended, namely for travel when fully occupied over the highways of the state of Utah and the Intermountain West. Contrary to said warranty, when put to the test of operation, said motor vehicle revealed that it was inadequately powered, that the drive train was insufficient to handle the weight and size of the motor home when used in the usual and ordinary course of plaintiff's travel over the highways of the state of Utah and the Intermountain West, and contrary to said warranty, the motor would not and could not be used with reasonable safety and without extraordinary and unusual damage to the same in Utah,

Nevada, California and other areas where the defendants would normally expect plaintiff to use said motor vehicle.

(e) Defendants Larson Ford Sales, Inc. and Ford Marketing Corporation, through Larson Ford Sales, Inc. represented to the plaintiffs that the Condor Motor Home was in a reasonably fit condition and could be reasonably used without excessive charges for repair in the Intermountain West, and represented that said vehicle has a reasonable amount of trouble-free use remaining in its useful life, when in truth and in fact said motor vehicle was worn out or so defective, as was well known to both Larson Ford Sales, Inc. and Ford Marketing Corporation, that it could not be used at all without excessive wear and without requiring its owner to pay substantial amounts in excess of what would be reasonable to maintain the vehicle in a reasonably good working condition." (R. 370 and 371)

The prayer of plaintiffs' Complaint requests the sum of \$14,225.00 and \$1,500.00 general damages for repairs, a further sum of \$5,000.00 general damages, or for rescission of the contract, and \$6,500.00 general damages.

After pre-trial discovery, a plenary trial was had.

The facts as they appear from the record are as follows:

The plaintiff, John Christopher, and his son, Robin, had been looking for a motor home for several days, had looked at various brands of motor homes (R. 443, L. 2-4), and saw the subject unit on May 9, 1972, while driving by Larson Ford and stopped to look at this unit (R. 395 and 396). At that time, the Christophers had a conversation with Jon Larson, a salesman

working for Larson Ford, telling Mr. Larson that they needed a unit which would have room for ten boys and pull another machine or car, and were assured by Mr. Larson that it would, and further, Larson told Christopher the name of a man who had a Condor which was an identical unit, who pulled a big horse trailer with four horses in it and had no problem. Christopher didn't talk to this person (R. 397, L. 22-28). Christopher, at this time, also noted the subject unit had over 7,000 miles on it, and in response to this, was told by Larson that the unit was a demonstrator and had a new motor in it, because the original motor had "blown up" at Bakersfield, California (R. 390, L. 6-14). After that, Robin, the son, looked around for other motor homes, and had looked at another motor home, but the price was \$21,000.00 to \$23,000.00 (R. 557), and the plaintiff told Robin to make Larson an offer less than the asking price to "feel him (Larson) out" (R. 399, L. 9-23). At no time had either Robin or his father taken demonstration rides in any other motor homes to see how they performed (R. 557 and 558), nor was there any testimony adduced by the plaintiff as to how other motor homes performed.

Financing was arranged through Murray First Thrift and Exhibit 4-P, a vehicle buyer's order, 9-P, a conditional sales contract, and 11-P (R. 431 and 432) were signed by the plaintiff on May 13, 1972, as documents of sale.

Paragraph 17 of Exhibit 9-P provides as follows:

"No representation, promise or warranty, express or implied has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller."

Christopher first drove the vehicle on May 18th or 19th (R. 406, L. 23). It did not have a trailer hitch on it (R. 444), and after Robin Christopher purchased a trailer hitch (R. 504) and mounted the same upon the motor home with the help of personnel from Larson Ford (R. 444, L. 21-27 and 504, L. 11-17), the plaintiff and his son drove the vehicle, towing a van owned by Robin, up Parley's Canyon and return. Thereafter, Christopher made the final payment of \$975.00 upon the contract and Jon Larson issued Exhibit 3-P, which gave the plaintiffs the balance of the Ford Warranty on the unit. Neither the plaintiff nor his son determined the weight of the Condor, the van, or the load

either carried, nor did they insist on any test drive of the vehicle before the plaintiffs signed Exhibits 4-P, 9-P and 11-P.

Thereafter, Robin Christopher, 18-year-old son of the plaintiffs, left Salt Lake City, with the motor home loaded with eight mentally retarded patients of the American Fork Training School who weighed about 140 pounds each (R. 519), their luggage and towing a Ford Econoline Van loaded with merchandise for San Jose, California, intending to make such a trip in one day (R. 518, L. 25), a distance of 780 miles (R. 549). In fact, he made it beyond Reno, Nevada, to a point some 50 to 70 miles into California the first day.

On this trip and travels after that, Robin claimed that the unit would pull down to five miles per hour on hills although it ran at speeds of 50 to 60 miles per hour on level and downhill stretches (R. 518 and 519), the generator which ran the internal electrical system wouldn't support electrical cooking units so Christopher cooked on a gas stove in the unit (R. 520), although a repairman in Oregon operated the generator easily (R. 524). Some times, Robin would have to wiggle the shifting lever to get the starter to engage (R. 522). At one point in Seattle,

Washington, the motor home with ten boys, their baggage, food and merchandise, and the van on behind, would not pull up a hill and Robin had to have one of the boys get in the van and help the motor home over the hill. On the way back from Seattle to Sacramento, California, the automatic transmission would occasionally shift by itself from third gear to second gear while going downhill (R. 530). During this time, the motor home was never taken to a Ford dealer for any adjustments pursuant to Exhibit 3-P, but was driven to Sacramento, whereupon Robin loaded all of the boys into his van and drove to Salt Lake City, Utah. Robin and his father went to Larson Ford and told Jon Larson about these various problems and were told to bring the motor home back to Salt Lake City and Larson would repair any problems on it (R. 533). Robin then returned to Sacramento and drove the unit as far as Reno, Nevada, where it would not start, for an unknown reason, whereupon Robin took a bus back to Salt Lake City, Utah. Larson Ford arranged for the unit to be taken to a Ford dealer in Reno and the transmission was repaired under a warranty of Ford Marketing Company and now works satisfactorily (R. 565). The plaintiff, after driving the motor home back to Salt Lake City, came into

Larson Ford and insisted that Larson take the unit back and refund his money (R. 428 and 429).

The plaintiff then took the motor home to a Mr. William W. Haslam, a bus mechanic, who testified that the solenoid which operates the starting system on the motor of the unit was mounted on the frame three-to-three-and-one-half inches from the exhaust manifold and the heat from the exhaust manifold caused a breakdown in the wiring inside the solenoid and caused failure of the starting system which could be cured by moving the solenoid further from the manifold (R. 610), and further that the fuel supply line for the motor which runs an auxiliary generator was installed cross-threaded, causing the motor to receive air rather than fuel through the fuel line (R. 611), which was cured by properly tightening the lines, then found that the fuel line was too short to pick up the fuel when the fuel level was below one-half of a tank (R. 612 and 613). Further, it was Haslam's opinion, admitted over objections by all of the defendants as to lack of qualification of the witness and improper foundation, that the power train design was too small for the load it was to carry, and further that when Haslam turned the air cleaner

cover on the motor over, the motor was better able to handle the load, and further, it was Haslam's opinion that the air supply to the engine was restricted because of design (R. 621 and 622), and further that a howl in the driveline complained of by Christopher was a result of a mismatch of gears and further, that the motor, transmission driveline and differential were too small to handle this particular size of motor home (R. 624). However, the motor had adequate compression according to Haslam's tests (R. 638 and 639).

An expert with respect to the ability of a given chassis to climb a given grade with a load was called by the defendant, Larson Ford, Donald F. Lee, testified that various factors influenced the ability of any automobile or truck to climb a hill, but that the absolute maximum speed that the particular chassis in the plaintiffs' vehicle could attain going up a six percent (6%) grade with a gross combined vehicle weight of 19,200 pounds would be 12 miles per hour (R. 836) with the wind, temperature conditions and air pressure all operating to lower this speed (R. 841).

The unit in question was manufactured by Condor and purchased by Larson as an authorized Condor Coach dealer from Condor Coach Corporation on August 5, 1970. Exhibit 25-DC which was contained in a large operator's manual which was presumably in a drawer within the motor home for which Larson Ford signed

a receipt, exhibit 24-DC (P. 857). Exhibit 25-DC, entitled "Warranty" provided that in order for it to be in effect the Condor Coach be purchased from or delivered through an authorized Condor Coach dealer and provided that the Condor Coach body and the installation of component parts were warranted to be free from any substantial defects for twelve (12) months after the date of delivery to such purchaser or until it was driven 12,000 miles, whichever occurs first. There were no documents of sale between Condor and Larson Ford as it was a cash transaction.

Because of a defect in the interior panelling, the unit was driven back to El Monte, California, and the interior was replaced by Condor under its warranty, then on the way back from El Monte, California, the engine failed (R. 860) and was replaced under the Ford warranty (R. 861). The vehicle was returned to Salt Lake City, Utah, by Park Larson and sat on Larson's lot until the Christophers purchased the vehicle in May of 1972. There was no evidence of any changes made mechanically in the motor home during the time that Larson Ford had it, except the replacement of the motor under the Ford warranty.

At the time that Larson Ford was sued by the Christophers in this matter, Park Larson, the president of Larson Ford contacted Condor and informed them of the lawsuit (R. 861 and 862), and also there was a conversation after the lawsuit began with Condor's personnel regarding the nature of the claim (R. 865).

It was stipulated between Larson and Condor that the evidence of the Christophers of breach of warranty could be considered as evidence of breach of warranty alleged by Larson against Condor (R. 868 and 869). However, with respect to those defects, Condor's president, Mr. Kieffer, testified that if the solenoid was mounted too close to the exhaust manifold on this unit and such a location caused solenoid failure, that he would have had 400 other claims (R. 890) and that a certain amount of driveline howl is usual, and if it is abnormal it could be repaired, also that the odometer for the generator on the unit showed that the generator which Christopher claimed would not run showed that the generator had run 352 hours (R. 893). Further, Mr. Kieffer testified that this particular unit, if it were not abused could and would pull a 4000 pound trailer (R. 898) and that he personally pulls a jeep behind his own Condor motor home to the mountains of Colorado (R.879).

ARGUMENT

POINT I.

IT WAS ERROR FOR THE TRIAL COURT TO SUBMIT THE ISSUE OF MERCHANTABILITY TO THE JURY.

A. Submitting the issue of merchantability to the jury violated the right of the defendant Larson to be advised of

the nature of the claim made by the plaintiff.

The Complaint of the plaintiff does not mention the word merchantability in any respect, yet the trial court submitted the issue of merchantability to the jury by instruction number 12 to which objection was made by counsel for Larson Ford at page 375, L. 30 and page 376 of the exceptions to jury instructions. No Motion to Amend the Complaint was made by the plaintiff or granted by the Court.

In Buehner Block Co. v. Nick Glezos, 6 U2d 226, 310 P2 517 (1957), the Court held that an adverse party is to be given the benefit of every doubt and not to have been misled nor in any way prejudiced by the introduction of new issues. Morris v. Russell, 120 U 545, 236 P2d 459 (____), and National Farmers Union Property and Casualty Co. v. Thompson, 4 U2d 713, 286 P2d 249, completely support this holding going on to recount the efforts to eliminate technicalities and liberalize procedures, but never to the extent that we lose sight of one of the cardinal principals of due process of law - to allow a party to have notice of the issues and an opportunity to meet them before his rights with respect to them are concluded. In Cheney v. Ruckes, 14 U2d 205, 389 P2d 86 (1963), the Court stated that

in order to safeguard the rights of the other party, he must have a reasonable time to meet a new issue if he so requests. The defendant, Larson Ford Sales, did object to the amendment and were caught unaware as to the issue of merchantability as to the plaintiffs' claim. On P. 911, L. 1-4, of the transcript of trial (4th day) counsel for defense declared his position:

"I didn't come into Court prepared to deal with merchantability and I don't have any instructions with respect to merchantability because it was never set forth in the Complaint."

Therefore, the Court was fully aware of his surprise and his feeling a disadvantage at permitting the new issue to become part of the Complaint. Further, in Pacific Marine Schwabacher, Inc. v. Hydrosift Corp., ____ U2d ____, 525 P2d 615 (1974), an amendment allowing merchantability was presented to the Court and would have been refused, but for the words in the original Complaint alleging the goods concerned in the case in "no way salable." The words themselves raise the issue of merchantability, the Court citing 3 Benders UCC Services, sec. 7 at (3), defined the standard of merchantability as to be honestly resalable in the normal course of business. Read in conjunction with U.C.A. 70A-2-316(2), which requires any disclaimer of merchantability to mention merchantability and in case of writing to be conspicuous, a development of the law has focused

itself toward the clarifying of any issue concerning merchantability so as to make all parties concerned aware of such an issue. The defendant in this case was not made aware of this issue by any specific wording in the Complaint. There was no mention as to the merchantability or salability of the motor home nor a reference as to its failure to meet the standard set by other motor homes on the market being sold daily.

It was error for the court to violate the rights of Larson Ford to a fair trial by allowing the issue of merchantability to be submitted to the jury when the wording of the Complaint and all other proceedings in this matter indicated that a claim of warranty of fitness for a particular use and fraud only were being made.

B. The warranty of merchantability was disclaimed by the documents of sale signed by the plaintiff.

The trial court properly ruled that the plaintiffs' claim for breach of warranty for fitness for a particular use was properly disclaimed by the documents of sale (R. 720 and 721), but allowed the claim of merchantability to go to the

jury. Exhibit 4-P signed by the plaintiff included an exclusion as to implied warranties in larger type and of a darker print than the balance of the contract. As to new vehicles in paragraph 6 below the word conditions, the current printed warranty as to that vehicle was in lieu of, "any implied warranty of merchantability or fitness for a particular use." As to used vehicles in the same paragraph, "no warranties express or implied, are made by the dealer with respect to used motor vehicles furnished hereunder except as may be expressed in writing by the dealer for such used vehicle, which, if so expressed is incorporated herein." On the same day, the plaintiffs signed the retail sales contract, Exhibit 9-P, which being signed by both seller and buyer was incorporated to complete the sales agreement. Exhibit 9-P contained the above mentioned disclaimer in paragraph 17.

"No representation, promise or warranty, express or implied has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller."

In Landes and Co. v. Fellows, 81 U 432, 19 P2d 89 (1933), a used harvester was purchased subject to an order and a sales contract. The order did not include a disclaimer of implied

warranties, but the sales contract contained such an exclusion. The Court held that since the sales contract and the order covered the same subject matter, the sales contract merged and superceded all prior oral and written contracts concerning that purchase and therefore excluded all evidence as to breach of warranty. Further, that where goods are sold on inspection, as in the instant case, there is no standard but identity and no implied warranty other than that identical goods should be delivered. Since the conditional sales contract contained the disclaimer in writing by the terms of the order, the disclaimer was incorporated into the order. Also, the sales contract merged and superceded the order according to the holding in Landes and Co., and therefore the disclaimer applicable to this purchase was contained in the sales contract and excluded any implied warranty of merchantability. In the case of Redmond v. Petty Motor Co., 121 U 32, 242 P2d 302 (1952), the trial court refused to submit a claim of warranty of merchantability to the jury and the Utah Supreme Court, on appeal held that where a written contract had a disclaimer of expressed or implied warranties and there was no evidence that plaintiff did not read the agreement, the breach of an implied warranty of merchantability

could not be submitted to the jury. The evidence fails to show that the plaintiff, John Christopher, did other than sign the contract. There is no testimony as to his failure to read the contract before signing. Further, in Tibbets v. Openshaw, 18 U2d 442, 425 P2d 160 (1967), the Court ruled that where homes were sold, "as is," which were allegedly not constructed in a good and workmanlike manner and not in accord with local building codes, the contract stands as the agreement between the parties. The Court cited U.C.A. 70A-2-316(3), "Unless circumstances indicate otherwise all implied warranties are excluded by expressions like, 'as is,' 'with all faults,' or other language which in common understanding makes it plain there is no implied warranties." In the purchase of goods between the parties herein, the exclusion of any implied warranties not included in the contract was made in both agreements signed by the plaintiff. Both were in larger and darker print, conspicuously using the words excluding such warranties. 70A-2-316(2) requires the mention of merchantability in a conspicuous manner. Both agreements mention merchantability; and the conditional sales contract applies the term narrowly and without any doubt to the vehicle purchased by the plaintiffs.

In another jurisdiction, such a disclaimer as to merchantability was held to waive any subsequent issue concerning a breach of such a warranty. See Childers and Venters, Inc. v. Soward, 460 SW2d 343 (Ky 1970). Thus, in this sale, there was no warranty of merchantability, and therefore the motion to dismiss the claims of the plaintiff should have been granted, or the motion for a judgment notwithstanding the verdict should have been granted.

POINT II.

THE EXPRESS WARRANTIES AS TO THE MOTOR HOME WAS NEVER BREACHED BY DEFENDANT, LARSON FORD SALES, INC.

The only written document giving any warranty upon the vehicle was Exhibit 3-P, a letter given by Jon Larson in lieu of the Ford Service Warranty Card by the following words in said exhibit:

"This unit is fully covered under Ford's service warranty and at time of delivery, we were unable to furnish his Warranty Card."

Such wording could not give the Christophers any greater warranty than whatever was provided in Ford Motor Company's service warranty, which was never proved at trial. However, mechanical repair service was never denied the Christophers

when they sought mechanical repair from a Ford dealer. Pursuant to this letter, the Christophers had the transmission repaired in Reno, Nevada, shortly before they attempted to rescind this transaction with Larson Ford Sales. In Vernon v. Lake Motors, 26 U2d 269, 488 P2d 302 (1971), a fire originating under the dashboard caused the new vehicle to be ruined en route to the dealer from whom the vehicle was purchased. The plaintiff previous to the damage noticed the smoke, inquired with a local dealer, and then proceeded to return it for repair. The Court refused to allow plaintiff damages under breach of warranty if it could be shown she knew of the defect and possible danger. The plaintiff, John Christopher, complained of the lack of power in this vehicle after his first trip up Parley's Canyon as evidenced in the transcript of the trial. However, the plaintiff continued possession of the vehicle and, in fact, took the vehicle on his trip to California. He gave no notice of a breach of warranty at that time, nor until the unit had been driven from Salt Lake City, Utah, to San Jose, California, then to Seattle, Washington, and back to Sacramento, California. The plaintiff's duty was to give such a notice at the time of discovery or take the risk of any subsequent damage resulting

from the same defect of which he complained. There being no other warranties given with this particular sale, the action for breach of warranty must fail in accordance with the holdings of the foregoing cases.

POINT III.

THE COURT ERRED IN NOT DISMISSING PLAINTIFFS' WARRANTY CLAIM DUE TO THE PLAINTIFFS FAILURE TO MEET STATUTORY REQUIREMENTS.

The plaintiff failed to notify the defendant of the breach of warranty and subsequently returned the unit to the defendant demanding his money back, plaintiff must meet the requirements of U.C.A. 70A-2-608, entitled, Revocation of Acceptance, in turn giving defendant the right to cure under U.C.A. 70A-2-508. The purpose of these sections of the U.C.A. is to allow the seller a chance to conform the goods to the buyer's demands before allowing the buyer to rescind a contract to which he agreed. The defendant, Larson Ford, was at all times willing and able to cure the problems with the vehicle. The vehicle did make the trip to California and after repairs returned. The problems which arose on the trip could be cured, and the right to cure any non-conformity should have been granted the defendant before the plaintiff was allowed to rescind

his contract under U.C.A. 70A-2-711. Without meeting such requirements of notice and right to cure, the plaintiff is limited in U.C.A. 70A-2-714 to recover for a breach of warranty only the difference between the value of the goods as represented and the actual value of the goods when the purchase was made. No evidence was adduced at the trial to show such a difference in value. Thus, if a breach of a warranty could be found, the damages lie in awarding a benefit of the bargain and not in rescinding the contract and awarding the contract price to the plaintiff. Since no evidence was received by the Court on this issue plaintiffs' claim for warranty should have been dismissed.

POINT IV.

NO STANDARD OF MERCHANTABILITY WAS ESTABLISHED AS TO THE MOTOR HOME.

Absolutely no evidence showed that the performance of the motor home was not of merchantable quality as compared to other motor homes on the market. The only witness appearing for the plaintiffs was Mr. Haslam, who, while he had extensive experience with school buses, was not aware in any way of the way motor homes having automatic transmissions would or should

perform. There was no evidence of what was considered a "merchantable quality" as to the motor home, or as to the performance of other motor homes. In Pacific Marine Schwabacher, supra, the Court announced that the standard of merchantability of goods was to be such as to be resalable in the normal course of business and at least fit for the ordinary purposes for which such goods are used. The plaintiffs allege that the power train coupled with the motor was not capable of pulling the motor home adequately over the roads of the intermountain region. The president of Condor at P. 880 stated that over 2000 such motor homes of equivalent specifications are on the road today. Several drivers of the Condor motor home have testified as to the capabilities of that particular unit over a given road of various surfaces and gradients. This particular vehicle went to California and back and was driven recently over Parley's Summit at 18 miles per hour according to plaintiffs' witnesses and 25 miles per hour according to defendant's witnesses. No comparisons were made by plaintiffs between the motor home in question and other similar motor homes to establish a failure to conform with the standard of merchantability as to such vehicles. In Hayes Merchandise, Inc. v. Dewey, 474 P2d 27 (Wash 1970), a

standard for determining substantial impairment of value to the buyer was "To be based on an objective factual evaluation of the buyer's particular circumstances rather than upon a subjective test of whether the buyer believed that the value was substantially impaired (at 273)." The evidence which appears in this case does not show that the motor home was not merchantable, but that the vehicle failed to meet this particular buyer's expectations which were not shown to be on a par with the reasonable expectations of such a vehicle.

A California court in Basta v. Riviello, 66 Lach Jun 77

(Lacauanna County Court, Pa 1964), would not apply an implied warranty of merchantability if an automobile is reasonably fit for the general purpose for which it was sold. Tracy v.

Vinton Motors, 130 Vt. 512, 296 A2d 269 (1972), applied such

— a warranty only to the operative essentials of a new car as suited for the ordinary purposes for which the car was manufactured. The evidence did not attempt to show that the vehicle purchased by the plaintiffs failed to meet the standards of salability of motor homes as to their ordinary use and thus failed to prove a breach of an implied warranty of merchantability. (Without such a standard, how can any person say that it is or is not unmerchantable?) Thus, the Court erred in submitting

the issue of merchantability to the jury because such a claim was never made by plaintiffs, such a claim was properly disclaimed by the vehicle buyer's order and conditional sales contract signed by plaintiffs and no standard of merchantability as to the motor home was proved, thus no breach by the defendant Larson Ford of such a standard was proved. The Motions for Dismissal, for a Directed Verdict and for Judgment Notwithstanding the Verdict as to this claim should have been granted.

POINT V.

THE COURT ERRED IN SUBMITTING THE CLAIM OF FRAUD TO THE JURY SINCE THE PLAINTIFF FAILED TO PRODUCE CLEAR AND CONVINCING EVIDENCE.

The only remaining claim of the plaintiff is that of fraud committed. The elements of fraud are:

1. A statement of fact
2. The falsity of said statement
3. The facts stated were material
4. The person who made the statements knew that they were false
5. The person making the statements intended that the plaintiff would rely upon said statements
6. The plaintiff's ignorance of the falsity of said fact

7. The plaintiff's reasonable reliance upon the truth of the matters stated

The elements must each be proved by clear and convincing evidence (Oberg v. Sanders, 111 U 507, 184 P2d 229).

A. The first requirement of fraud is that a statement of fact be made. The statements made by Larson were statements that others had successfully pulled trailers behind their Condors. There is no mention as to where they pulled them, how fast they pulled them, over what grades they pulled them, or any other concrete terms which the Utah Supreme Court has regarded as being a statement of fact or warranty. Examples:

1. Chicken feed was equal to or superior to any feed method then in use, chickens would not moult for 15 months, time effort would be saved, feed would be less expensive, were not statements of fact, but were puffing; although a statement that the feed would increase egg production by 65% was a statement of fact sufficient to be a warranty Park v. Moorman, 121 U2d 339, 241 P2d 914 (1952).

2. Stoves would sell like hotcakes, were far superior to ordinary ranges for cooking and baking, best and finest

on the market, and were of first class quality, were all puffing, and as a matter of law, not statements of warranty Detroit Vapor Stove v. Wheeler, 61 U 503, 215 P2d 995, ALR 2nd 632 (1923).

3. Statements by equipment manufacturer's representatives that a contractor, "could build these buildings and finance them and there was nothing to worry about," where said representative had arranged the meeting with the contractor, and subsequently when asked by the building owner whether to advance a loan to the contractor, was told by the representatives, " He thought that it was all right, but to protect myself," as a matter of law were not statements of fact upon which fraud could be based. Jardine v. Brunswick Corp., 18 U2d 378, 423 P2d 659 (1967).

4. Vases purchased by defendant at a price he determined as an expert appraiser from the plaintiff who had little knowledge concerning the value of such vases, was not viewed as a fact upon which fraud could be based when another expert testified to a much greater valuation. Thomas v. Caldwell, 27 U2d 423, 497 P2d 31 (1972).

B. The second requirement of fraud is that the statement must be false. There was never any showing in the record that any statement Larson made was false. When asked what Larson actually said to him on that occasion, Christopher stated at page 2, line 1:

"He said it would easily pull a trailer; that they had on other instances, and he specified one and told us the man's name who had a Condor and it was identical . . ."

The plaintiff has the burden of proving that this statement of fact was false and no attempt was made to prove any of these facts false, so far as the record appears, everything which Larson told Christopher was true. A prime example of such a case is CIT v. Sohm, 15 U2d 262, 391 P2d 293, wherein the trial court found fraud in certain statements made by a seller of microwave ovens and the Supreme Court reversed such a finding, holding that where the plaintiff sued in fraud alleging that the defendant represented that a microwave oven was useable for all general home purposes except for frying pancakes, and in fact, the oven would not fry eggs, bake cakes or bread, cook cereals, and can fruit, where the plaintiffs sought out the defendant, and the demonstrator for defendant as well as the defendant denied making any misleading statements and the only

evidence of the alleged misleading statements of defendant was testimony of plaintiffs, that the Supreme Court would review the facts as well as the law, and reversed the trial court, essentially saying that where defendant's demonstrator and defendant stated only what the manufacturer said, there was no showing that they knew or should have known that the statements they made were false, that there was not clear and convincing evidence of fraud required by Utah law. In Auerbach v. Samuels, 10 U2d 152, 349 P2 1112 (1960), the executrix of an estate told the plaintiffs prior to the decree that there wasn't enough money to go around as to their legacy and subsequently failed to notify them that it depended on when the valuation of the estate was made, before or after taxes. The courts held that even where such a fiduciary relationship exists if the plaintiffs had the opportunity and knowledge to pursue the issue at the time, a charge of fraud could not be raised. Again, the evidence was not clear and convincing that the statement was false.

C. The fourth requirement of fraud is that the plaintiff must show that the person who made the statements knew that they were false. No such showing was attempted in the record, to the contrary, each of the persons, other than Robin

Christopher, who had operated this particular vehicle testified at the trial that no mechanical problems with the vehicle were encountered by them with the exception of a motor failure at Bakersfield, California, of which the Christophers were well aware. Further, the owner of Condor Coach Company testified that the Condor would successfully pull a vehicle behind it, and that he drove a unit similar to that of defendants' from Los Angeles, California, into the Colorado Rockies pulling a jeep behind it. Further, the Court in Ellis v. Hale, 13 U2d 279, 373 P2d 382 (1962), held that a distinction must be drawn between negligent and intentional fraud. In this case, even where a seller of a subdivision plat failed to disclose to the buyer that the plat was not recorded or approved, the Court held that no specific duty of care runs between the parties even if a false statement was made by the seller without reasonable diligence in verifying his representations if the parties are dealing at arm's length. Therefore, no duty was upon the defendant, Larson Ford, to even verify his representation if he believed them true. The facts show he did believe the vehicle would perform as he stated.

D. The fifth requirement of fraud requires that the person making the statements intended that the plaintiff would rely upon such statements. The defendant disclosed to the

plaintiff the names of other persons in the area who used the motor homes in a similar manner as the plaintiff intended. The defendant gave such names in order that the plaintiff would not rely solely upon his representations. Again, in Ellis v. Hale, supra, the Court held that the plaintiff failed to prove the defendant made the representations with the intention that the plaintiff so rely. The Court supported this finding on the basis of the plaintiff's ability to ask a simple question to verify the defendant's statements, and his failure to do so. In a like manner, Mr. Christopher could have discovered further information on which to rely.

E. The seventh element of fraud is that the plaintiff's reasonable reliance upon the truth of the matters stated must be shown. Both Robin and John Christopher admitted that they drove the vehicle along with Jon Larson prior to executing the documents of sale. No vehicle was attached because the trailer hitch which the Christophers were to obtain and install was not installed at that time. In any event, the vehicle was there to be driven, and its performance could be evaluated by the Christophers to compare with any statements made by Larson, also the name of another Condor owner, who pulled a trailer, was given to the Christophers, but they didn't bother to seek him out.

An interesting case in this regard is that of Slaughter v. Gerson, 13 Wall, (U.S.) 379, 20 L.Ed. 627, 61 ALR 495 (1872), where a seller of a steamboat told the buyer that the draft of the steamboat was shallow enough to navigate a particular river where the buyer intended to run the boat, and the buyer could have ascertained this fact but didn't, the buyer was held as a matter of law not to have relied upon the seller's statements as required in fraud cases. Utah followed this rule in the leading case of Pace v. Parrish, 122 U 141, 247 P2d 273, 54 ALR2d 667 (1952), the trial court found that fraud had been perpetrated in the sale of bottom land where the representation had been made by the seller that it was cultivable. The buyer actually looked at the land, and by his own investigation, could have ascertained whether it was cultivable or not, but didn't. The Supreme Court, for this reason, reversed the finding of fraud and the damages awarded with respect to this land. Certainly, in the instant case, the Christophers were in a position to see the vehicle, evaluate its performance, and speak to others regarding their experience with pulling vehicles behind the unit, the fact that they did not do these things properly does not now give them any reason in law, to void a contract as they seek to do here.

In Lewis v. White, 2 U2d 101, 269 P2d 865 (1954), the Court imposed upon the plaintiffs a duty to investigate no matter how naive or inexperienced they were in order for them to reasonably rely upon the seller. A similar duty in Auerbach v. Samuels, supra, was required even where a fiduciary duty ran between the parties. There is no reason to place a higher standard of duty upon the defendant, Larson Ford, who was dealing at arm's length with the plaintiff, than in such cases as these. Fraud was not shown.

F. The final and most demanding element of a fraud case is that it is to be proved by clear and convincing evidence. A review of the evidence of each of the elements referred to hereinabove shows that no such evidence was adduced at the trial. In CIT v. Sohm, supra, this Court reviewed the requirements of the clear and convincing evidence rule, and found the evidence in that case to be wanting in that regard and reversed the trial court's finding of fraud as a matter of law. This was done despite the fact that the buyer's evidence, consisting of oral testimony, was that the defendant told them that the oven was useable for all general home purposes except frying pancakes, and this was disputed by the seller, his demonstrator and the manufacturer's literature, the buyer had not presented

clear and convincing evidence of any fraud. In Lewis v. White, supra, the deliberate reference to an income exceeding the truth by \$775.00 by sellers of a hotel to an elderly lady was not a convincing show of fraud by the defendants. The evidence in the instant case fails to show by clear and convincing evidence that any statement of fact was made, that any statements made were false, that Larson knew or should have known that they were false, that Larson intended that the plaintiffs rely upon those statements, or that the plaintiff relied reasonably upon any statements of Larson. None of these are shown by even a preponderance of the evidence, let alone the clear and convincing evidence required by this Court in its previous decisions, therefore the trial court erred in refusing to grant the Motions to Dismiss, for a Directed Verdict and for Judgment Notwithstanding the Verdict of the defendant, Larson Ford.

POINT VI.

IT WAS ERROR FOR THE TRIAL COURT TO DISMISS THE THIRD PARTY CLAIM OF LARSON AGAINST CONDOR COACH CORPORATION.

A. The issue of whether or not the defects of which the Christophers complained was a jury question and should have been submitted to the jury.

The evidence of plaintiff was incorporated into the Third Party Claim of Larson, the dealer, over against Condor, the manufacturer who sold Larson the finished product. The plaintiffs' case as to the mechanical reasons for the problems which the Christophers had relied upon the testimony of William Haslam, who testified that the starter solenoid (Exhibit 7-P) was mounted on the frame too close to the exhaust manifold of the engine, causing the starting problem, a problem, if it did exist, which would have caused Condor many problems (R. 879 and 880). The fuel line for the auxiliary generator was installed cross-threaded, a matter easily repaired by Haslam, the cause of the failure of the generator auxiliary motor to run when the tank was less than half full was never actually determined, but this was one of the items installed by Condor. Further, the restricted air supply to the motor which Haslam testified cut the power was either a problem with the Ford Marketing design or with the way in which Condor placed the coach body over the chassis. Condor should have been aware of the problem in any event, for if it existed, it would affect the ability of the motor to move the unit over the road. Haslam's final opinion was that the drive train was too small for the load it was to carry, and Haslam had only

tested the motor home without towing another vehicle. Condor ordered the chassis, constructed the coach, and installed the various components within the coach - in short, determined the size of the motor, transmission and driveline of the chassis; determined the way that the body was placed on the chassis and the weight of the body. The only change affecting these factors while the motor home was in the possession of Larson was the replacement of the motor pursuant to the Ford Marketing warranty. Neither Haslam nor any other witness claimed that the motor was any different in design or power than the original motor that was on the chassis when Condor ordered the chassis from Ford Marketing. There is no evidence of any other relevant change in the motor home from the time that Condor manufactured it until the plaintiffs purchased it, other than being driven as a demonstrator for between 7000 and 8000 miles. It is significant that Mr. Haslam never once mentioned the passage of time, wear and tear, or prior use as being a factor causing any of the problems which he found. The problems to which he testified were defects in design over which Condor had control. In the face of such evidence, it is submitted that it was error for the trial court to rule as it did that the mere

passage of time and the use of 7000 to 8000 miles was sufficient to say as a matter of law that the defects complained of by plaintiffs did not exist at the time of sale by Condor and take this issue away from the jury. To hold a dealer responsible as a matter of law to the ultimate purchaser for defects so obviously the product of poor design and construction on the manufacturer's part while denying the dealer recourse as to the manufacturer, would be to destroy the effectiveness of U.C.A. 70A-2-314 as intended by the Official Comments to the Uniform Commercial Code, 1 Uniform Laws Annotated, 191,

Comment #8:

"Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered by paragraph (c) . . . Correspondingly, protection under this aspect of warranty of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be 'honestly' resalable in the normal course of business . . ."

The proper disposition of the issue of whether or not these defects, which were at best latent, existed at the time of the sale to Larson should have gone to the jury, because the evidence supports the theory that they were all matters of design over which Condor had control and if they did exist, existed at the time of sale from Condor to Larson. The only

case in Utah on this point is Chrysler v. Burns, ____ U ____, 527 P2d 655 (1974), which held that warranty of fitness for a particular use was excluded by a contract and that the ultimate consumer who bought the property, apparently without funds to pay for it, could not be heard to rescind the contract after living in the property for two years. The defects complained of in that case should have been discovered. In the instant case, none of these defects were discovered until the Christophers apparently discovered them. Further, the sale by Condor to Larson, a dealer, contemplated a holding time by Larson as a dealer and a sale to the ultimate consumer. It should be foreseeable where a manufacturer is selling a \$15,000.00 or more piece of merchandise, that a year or two passage of time may be necessary in order to find the ultimate consumer.

B. Any expressed warranty by Condor applying to the ultimate consumer should not be applied to the relationship between Condor and Larson.

The wording of Exhibit 25-DC makes it clear that the warranty and the terms thereof were to govern the liability of Condor directly to the purchaser from an authorized Condor dealer, for the period of time of the express warranty, 12 months is computed from the delivery to the purchaser by an

authorized Condor dealer. A similar warranty was construed in Redman Industries v. Binky, 49 Ala. App. 595, 274 So2d 621 (1973), under the Uniform Commercial Code and the Court therein held that such a warranty was not intended by the manufacturer and the dealer to govern their relationship, but the relationship of the retail purchaser to the manufacturer.

C. Any disclaimer of warranty between Larson and Condor Coach Corporation as was provided in Exhibit 25-DC is ineffective.

There is no reference in Exhibit 25-DC that it is intended to apply to the relationship between the manufacturer and the dealer and under the Binky case, such a disclaimer of warranty does not apply to the relationship between the manufacturer and dealer.

Further, the purported disclaimer was not any document of sale as between Condor and Larson and was contained in a looseleaf book in a drawer in the motor home. The printing of the purported disclaimer was of the same size and color as the remainder of the printed document which was captioned, "Warranty," and does not appear in the wording until the very last sentence of this exhibit.

Such a disclaimer has been held to be ineffective and not in compliance with Section 70A-2-316(2) which provides as follows:

"(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"

and Section 70A-1-201(10) provides:

"(10) 'Conspicuous': A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is 'conspicuous' or not is for decision by the court."

In the case of Boeing Aircraft v. O'Malley, 829 F2d 585, (1964), the Ninth Circuit Court of Appeals construing a similar provision of the Uniform Commercial Code where the seller of a helicopter asserted a similar exclusion of the same color and sized type as the rest of a form, it was ruled as not being conspicuous. Similarly in Tiger Motor v. McMurtry, 224 So2d 630 (Ala 1969), the Alabama Supreme Court held that a similar disclaimer in the owner's manual was not effective, see also Koellmer v. Chrysler Motor Corp., 6 Conn. Cir. 478, 276 A2d 807 (1970).

Thus, the trial court erred in holding as a matter of law that the defects complained of by plaintiffs did not exist at the time of sale, that warranty as provided in Exhibit 25-DC was void because the time of such warranty had run and that the purported disclaimers of warranty in Exhibit 25-DC were effective as to Larson Ford and conspicuously made as required by Utah law.

CONCLUSION

In conclusion, it is respectfully submitted that the various rulings of the trial court be reversed as to the claim of plaintiff and the trial court ordered to grant the Motion of the defendant, Larson Ford, to enter Judgment Notwithstanding the Verdict, or in the alternative, that a new trial be granted the defendant, Larson Ford, on all issues because of the erroneous dismissal of Condor Coach Corporation from the lawsuit.

Respectfully submitted,

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